the army LAWYER
HEADQUARTERS, DEPARTMENT OF THE ARMY

Department of the Army Pamphlet
27-50-74
February 1979

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Some *Goode* News and Some Bad News

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During the last five years, the Court of Military Appeals has shown increasing interest in the post-trial responsibilities of the convening authority, the staff judge advocate, the military judge, and trial and defense counsel. As a result of the increased interest, the court has by judicial decision significantly modified the post-trial processing of courts-martial. Four major decisions stand out above all others: *Dunlap v. Convening Authority*,[1] decided in 1974, 2United States v. Goode,[2] decided in 1975, *United States v. Cruz-Rijos*,[3] decided in 1976, and *United States v. Palenius*,[4] decided in 1977. One major decision per year for four years—almost like time-release aspirin but occasionally with the opposite result: creating rather than curing headaches for military practitioners at the installation level.

BACKGROUND

In *Dunlap*, the Court of Military Appeals created the post-trial "90 day rule" whereby the convening authority must take formal and final action in a case within 90 days of the beginning of post-trial restraint, or risk the likelihood of dismissal of the charges.[5] Despite criticism of the rule[6] and attempts to modify

it,[7] the 90 day rule has survived as a crminal law procedural rule unique to the military.

The second of these "big four" cases—*Goode*—requires that a copy of the staff judge advocate's post-trial review[8] be served upon counsel for the accused with an opportunity to correct or challenge any matter counsel deems to be "erroneous, inadequate or misleading, or on which he otherwise wishes to comment." Further, proof of such service, together with defense counsel's comments if any, must be made a part of the record of proceedings. The failure of counsel for the accused to take advantage of this opportunity within five days of such service will normally be deemed a waiver of any error in the review.[9] The Court of Military Appeals created this waiver doctrine to eliminate the large volume of appellate issues alleging errors in post-trial reviews, to eliminate the delay involved in resolving these issues, and to insure the accuracy of post-trial reviews.[10]

The case of *United States v. Cruz-Rijos*,[11] establishes two rules. First, *service* of the record of trial upon the accused must occur immediately after authentication and "well before" action by the convening authority.[12] Second, the *Cruz-Rijos* case requires *authentication* of the record of trial by the military judge in all but the most compelling circumstances.[13]

The case of *United States v. Palenius*,[14] mandated continued and vigorous post-trial representation by defense counsel. In so doing, the Court sought to fill a perceived gap in the legal representation of the accused occurring between the end of trial and the appointment of appellate counsel.[15]

Of these four cases, *Goode* with its waiver doctrine has caused the most difficulty. Deceptively simple at first appearance, *Goode* has raised difficult questions of interpretation and of its interrelation with *Dunlap, Cruz-Rijos* and *Palenius*. Many of these questions have remained unanswered until very recently. It is the purpose of this article to explore the present status of the waiver doctrine of *Goode* in light of recent Court of Military Appeals[16] and courts of military review decisions.

THE WAIVER DOCTRINE CLARIFIED

At first, it was unclear how far the waiver doctrine would be extended. The courts of military review, in the absence of C.M.A. guidance, created varying standards for applying

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Issues may be cited as *The Army Lawyer*, [date], at [page number].

the waiver doctrine. In the leading Army case, *United States v. Myhrberg*,[17] the Army Court of Military Review, *en banc*, determined that only where waiver of a defective review resulted in a "manifest miscarriage of justice" would it refuse to permit waiver. In *Myhrberg*, the maximum punishment was grossly misstated in the review. The defect, acknowledged by the Court to be prejudicial, was waived by defense counsel's inaction. In another case, a panel of the Army Court found no less than *seven* significant defects in one post-trial review (any one of which would have heretofore required a new review and action), but granted no relief because defense counsel's inaction waived the errors.[18] Panels of the Air Force and Navy courts of military review refused to waive errors or omissions in the "substantive requirements" for post-trial reviews,[19] where "the specter of egregious error lurks,"[20] or where the post-trial review contained a "significant defect" and waiver "would result in an injustice."[21] Finally, in October 1977, C.M.A. clarified the breadth of the waiver doctrine, indicating that it would be applied in all but the most egregious cases; that is, cases involving inadequate representation by defense counsel.[22] It is now clear that the waiver doctrine of *Goode* will render harmless virtually all errors in post-trial reviews when defense counsel fails to comment.

But is the five-day time period given to defense counsel for comment an absolute right? In *United States v. Forsyth*, the Army Court of Military Review said, "*Goode* requires that the Government . . *must* allow the defense counsel a *minimum* of five days to respond before taking final action" (emphasis added).[23] Indeed, the clear implication of *Goode* and of the cases construing it,[24] indicates that the five-day period is a mandatory minimum time, somewhat equivalent in effect to the five-day waiting period under Article 35[25] for general courts-martial. But the *Goode* five day period can cut both ways: in the absence of a defense request for delay,[26] the convening authority can take action at any time after five days. In one case in which the defense counsel submitted his rebuttal two hours late and an hour and a half after the convening authority took his action on the case, the Air Force Court of Military Review found waiver by defense counsel's failure to reply *within* five days.[27]

Defense Counsel's Role Defined

Palenius[28] clarified the status of trial defense counsel in the post-trial processing of the case. The attorney-client relationship continues until such time as substitute defense counsel or appellate defense counsel is active in the case.[29] *Palenius* indicated that among the duties of defense counsel required by the continuing attorney-client relationship is the *Goode* rebuttal. Later cases further strengthened this idea. For instance, *Cruz-Rijos*[30] broadened Article 54(c), UCMJ, to permit service of the record of trial, together with a copy of the post-trial review upon defense counsel of an absent accused, to assure effective representation of the accused for *Goode* purposes.[31] In another case C.M.A. recently indicated that defense counsel must be given *access* to the record of trial:

> The *Goode* rule is eviscerated when the advocate of the accused has no opportunity to utilize the record of trial to determine if there are errors in the post-trial review. We are compelled to agree with the suggestion of appellate defense counsel that the record of trial is an essential tool for the proper exercise of the defense counsel's post-trial duties. . . . Accordingly lack of access to the record prior to rebutting the. . . review necessitates a new review and action.[32]

A recent series of cases construing *Goode* provides the clearest indication of C.M.A.'s views of the post-trial relationship of defense counsel and client. *United States v. Iverson*[33] reaffirmed the *Palenius* decision in unmistakable terms: "[a]*b*sent a truely extraordinary circumstance rendering virtually impossible the continuation of the established [attorney-client] relationship, only the accused may terminate the existing affiliation with his trial defense counsel prior to the case reaching the appellate

level."[34] Another C.M.A. decision announced the same day further indicated the vitality of the attorney-client relationship after trial. In *United States v. Brown,*[35] the accused's trial defense counsel was hospitalized after trial at another installation and was, thus, deemed "unavailable" by the staff judge advocate to receive service of the post-trial review. Since no new valid attorney-client relationship was formed by the accused with any other attorney, C.M.A. found that the accused had been denied his *Goode* rebuttal right and ordered the case returned for a new action. Moreover, C.M.A. ordered The Judge Advocate General of the Navy to determine the *present* availability of the trial defense counsel. If the trial defense counsel was presently available "to continue to perform in the attorney-client relationship with the appellant, he will be served with the post-trial review and afforded the opportunity to file a reponse thereto."[36] Significantly, even though several years had elapsed since trial, C.M.A. still considered the attorney-client relationship to exist, and believed the orignal trial defense counsel, if available, to be the only proper party to make the *Goode* response. There are further indications of C.M.A.'s philosophy in this area of the law. The day after *Iverson* and *Brown* were announced, C.M.A. released *thirteen* additional decisions by summary disposition[37] indicating that whenever the trial defense counsel was available *anywhere in the world,* the appointment of a purported substitute counsel "effectively interfered with the established attorney-client relationship between the appellant and his trial defense counsel without 'good cause'.[38] C.M.A., after reversing the courts of military review decisions in most of these thirteen cases, returned the cases for further processing consistent with *Iverson.*[39] Many of these cases, like *Brown,* were three to four years old and, like *Brown,* have now been returned to trial defense counsel, if available.[40] Thus, it is now painfully clear that the original attorney-client relationship may endure for many years after trial, absent a showing of good cause or consent by the accused to termination of the relationship. It is now also clear that the strict standards for preservation of an existing relationship *before* trial are equally applicable in the post-trial setting, and interference with this existing relationship without good cause will not be tolerated by C.M.A.

Appointment of Substitute Counsel

The biggest problem to arise under the *Goode* waiver doctrine occurs when the trial defense counsel is no longer available to accept service or to comment on the post-trial review. Certainly the accused must be afforded the *Goode* rebuttal right, and the review must be served on *someone.*[41] Failure to provide this opportunity usually requires return of the case for a new review and action[42] (or for a new action alone[43]) with the rebuttal right included. In some cases, however, failure to provide accused with the right of rebuttal may even result in the ultimate sanction-dismissal of charges.[44] If the trial defense counsel is unavailable, service must be made upon substitute counsel for the accused. But, what is "unavailable?" When may substitute counsel be used? What is necessary to accomplish the substitution? These and other questions have largely been answered in a flurry of recent cases.

The *Iverson* case, described earlier, established a high standard for the post-trial attorney-client relationship. It also indicated that when substitute counsel is appointed to represent the accused after trial, the accused must know about and accept the substitute counsel. Acceptance by the accused, said C.M.A., is an absolute requirement for the establishment of the new attorney-client relationship, since an agent cannot act without the knowledge and consent of the principal.[45] Thus, where substitute counsel acts on behalf of an accused without accused's knowledge and consent, that counsel is a mere interloper. In such circumstances, the case will be returned to afford the accused the right of rebuttal by "his" or "her" attorney.[46]

In order for trial defense counsel to be "unavailable," there must be "truely extraordinary circumstances rendering virtually impossible continuation of the established relationship."[47]

Among the rare circumstances qualifying as "extraordinary" is the release from active duty of trial defense counsel.[48] On the other hand, defense counsel's reassignment (PCS) even to the far corners of the world,[49] temporary duty (TDY),[50] leave,[51] or mere "financial, logistical or administrative burden on the Government"[52] will *not* qualify as "extraordinary." It further appears that the *burden of proof* for showing "extraordinary circumstances" and "good cause" rests solidly on the Government, and reasons for substitution should be included in the record of proceedings.[53]

The formalities of appointment of substitute counsel (in those rare instances when such appointment is possible) have never been described in the case law. Judge Cook, dissenting in *Curtis*,[54] indicated that the mechanics for substitution of counsel before or during trial are different than those for substitution of counsel for the *Goode* response. After the conclusion of trial any amendment of the convening order to reflect substitution of counsel "serves no purpose." While Judge Cook apparently believes that no formal writing is required to appoint substitute counsel, "a written document of appointment would provide a record of the fact and reduce the potential for later disagreement as to what took place."[55] In light of the apparent burden of proof upon the Government, a written document of appointment containing reasons for the substitution of counsel—possibly in a format similar to that used in many jurisdictions for appointment of Article 32, UCMJ, investigating officers[56] is an excellent idea. A copy of the letter of appointment, forwarded with the record of trial, could document the service of the post-trial review on the new counsel and at the same time set out for appellate scrutiny the reasons for the substitution of counsel.

In addition to those situations in which defense counsel is truely unavailable, one other situation permits the substitution of counsel for *Goode* purposes. When the accused expresses dissatisfaction with his or her trial defense counsel, it is error to designate that counsel to do the *Goode* rebuttal absent an expression of renewed acceptance of that counsel by the accused.[57] Indeed, when defense counsel's competence is questioned, that counsel *cannot* be considered as "counsel for the accused" for *Goode* purposes.[58] The staff judge advocate should give the accused an opportunity to select a new defense counsel or to retract the criticism of counsel. Accused is certainly free to consent to the substitution of a new military defense counsel in whom he or she does have faith.[59] As an alternative to military counsel, the accused can hire a civilian attorney to comment upon the post-trial review and for other post-trial duties.[60]

Before leaving the subject of substitution of counsel for *Goode* purposes, there is an indication in two recent decisions that an intermediate procedure is possible in some situations. If trial defense counsel is TDY or is in some other absent status not amounting to "extraordinary circumstances," appointment of local *assistant* defense counsel is permitted.[61] In such a case, there is no severance of the existing attorney-client relationship but only augmentation of the defense team with a defense counsel who is readily available within the jurisdiction to consult and coordinate telephonically with trial defense counsel and to submit the *Goode* rebuttal on behalf of the accused. Of course, it follows that the accused must assent to the appointment of the assistant defense counsel, for the same reasons as expressed earlier.

The Army Court of Military Review has offered some additional suggestions for solving the time-and-distance problem when the trial defense counsel has left the immediate are: send the review (and presumably a copy of the record of trial) to defense counsel's address by registered mail; or, absent sufficient time, contact defense counsel by telephone and read the review to him.[62] Defense counsel can be required to submit rebuttal by telecopier, as has been done in one case,[63] or by other expedited means.

When the accused is represented by *both* military and civilian counsel the best practice is to serve *each* defense counsel with a copy of the staff judge advocate's post-trial review

since C.M.A. and panels of the courts of military review are split on the issue of exactly which counsel as a minimum *must* be served.[64]

Rebutting the Rebuttal

Once defense counsel has commented on a rebutted the staff judge advocate's post-trial review, may the staff judge advocate comment on the rebuttal *(i.e.*, rebut the rebuttal)? Under recent cases, not only *may* the staff judge advocate do so, but probably *must* do so in some instances. Certainly, the *Goode* rule was never intended to create an endless game of legal tennis between the staff judge advocate and the defense counsel.[65] Where the staff judge advocate amends the review merely to conform it to the request of the defense counsel, it is not necessary to re-serve the amended review upon defense counsel.[66] However, where the staff judge advocate submits a rejoinder to defense counsel's comments, a new service upon defense counsel may be required.[67] Moreover, the courts of military review have recently suggested that when defense counsel rebuts or comments upon a portion of the review *which is in error*, and the staff judge advocate *agrees* with defense counsel, it is incumbent upon the staff judge advocate to apprise the convening authority of the meritonious portions of defense counsel's comments.[68] Otherwise, it is impossible upon appellate review to determine if the convening authority followed the erroneous advice.[69] Where the staff judge advocate does alter the legal opinion in response to defense comments, the *original* review should not be altered. Rather, use of a separate addendum is strongly suggested by the Army Court of Military Review[70] and by the Criminal Law Division, OTJAG.[71]

Dubay Hearings

Whenever a *Dubay*[72] hearing is held and a post-trial review is subsequently written, that post-trial review must be served upon defense counsel. Failure to do so is error.[73]

When *Goode* and *Dunlap* Collide

Finally, what happens when it is impossible to comply with the *Goode* five-day period and at the same time comply with the *Dunlap* 90-day rule?[74] Picture the sad case of the post-trial review signed by the staff judge advocate on the 88th day of post-trial restraint of the accused. In order to meet one time period it is necessary to violate the other. There are several possibilities which have been tried in such a situation:

First, ask defense counsel if he or she wishes to request a delay.[75] This of course, is dependent on defense counsel's decision and cannot be forced upon defense counsel.

Second, take the accused out of restraint and avoid the *Dunlap* problem. In the *Ledbetter*[76] case, the convening authority took Sergeant Ledbetter out of confinement on the 88th day. C.M.A. noted that the *Dunlap* rule did not apply, but was scathing in its criticism of such a practice.[77] Despite C.M.A.'s criticism this risky method has been used to avoid the *Dunlap* sanction in several other cases.[78] In addition to C.M.A.'s warnings against use of this method, the method presents practical problems of accomplishing accused's release. Normally, by the 85th day, the accused is long gone from the situs of trial and is either located at the United States Disciplinary Barracks at Fort Leavenworth or at the Army Retraining Brigade at Fort Riley.[79] Further, what is the release to be called? Deferment? Suspension of confinement? Clemency? *Deferment* may only be granted upon accused's application. In *Ledbetter*, the convening authority granted "deferment" after twice refusing to do so. C.M.A. found the convening authority's new unsolicited deferment contrary to Article 57(d), UCMJ,[80] and credited the accused with confinement time.[81] If the action is to be called *suspension* of confinement, how is this to be accomplished? Suspension of confinement occurs *only at the time of the convening authority's formal and final action–and not before.*[82] *A Navy convening authority recently ran afoul of the Navy Court of Military Review by attempting to "suspend" confinement with an "interlocutory action."*[83] *Clemency*, like suspension, is normally granted at the time the convening authority takes formal and final action on the case.[84] Even if clemency were possible, trans-

formation of confinement into a *lesser* form of restraint will not solve the problem, since *Dunlap speaks of 90 days of restraint*[85] rather than 90 days of *confinement* as does the *Burton* "90 day rule."[86] So, clemency appears to be an all-or-nothing proposition regarding restraint. In addition, is clemency practical or palatable if the accused has received a long sentence to confinement and deserves every day of it?

When the time limits of *Goode* and *Dunlap* collide, it is also possible to attempt to make out a case of "exceptional circumstances" for complying with *Goode* and for going beyond the 90-day period.[87]

Finally, when faced with a *Dunlap-Goode* collision, the staff judge advocate is well-advised to consider the sanction in each rule. If one or the other time limits must be violated, compliance with *Dunlap* rather than compliance with *Goode* makes the best of a bad situation. If *Dunlap* is violated, the sanction is always dismissal of charges. If *Goode* is violated, the normal sanction is a new review and action. When faced with the options of delaying final appellate review and suffering dismissal of charges, the choice is not difficult for the staff judge advocate to make.[88] Several Courts of Military Review have tolerated this procedure.[89]

Conclusion

During the past several months C.M.A. has virtually swept its docket clean of cases with *Goode* issues. The courts of military review have been equally active in this area of the law. In the process, the appellate courts have provided answers to many questions raised by the *Goode* waiver doctrine and concerning its relation with other post-trial processing requirements. It is now clear that the *Goode* rebuttal opportunity is one of defense counsel's most important duties as part of the post-trial continuing attorney-client relationship. Any attempt to deprive the accused of the full measure of this right will not be permitted by C.M.A. In the course of clarifying the waiver doctrine, the appellate courts have provided procedural suggestions and guidelines for accomplishment of post-trial processing of courts-martial cases. While further clarification is needed and will certainty be forthcoming, enough *Goode* guidance has now been provided so that staff judge advocates and defense counsel alike can inch their way safely past this post-trial pitfall.

Footnotes

[1] 23 C.M.A. 135, 48 C.M.R. 751 (1974).

[2] 50 C.M.R. 1, 1 M.J. 3 (C.M.A. 1975).

[3] 1 M.J. 429 (C.M.A. 1976).

[4] 2 M.J. 86 (C.M.A. 1977).

[5] Specifically, the rule in *Dunlap* states that a presumption of a denial of a speedy disposition of the case will arise when the accused is continuously under restraint after trial and the convening authority does not promulgate his formal and final action within 90 days of the date of such restraint after completion of trial. This presumption will place a heavy burden upon the Government to show diligence, and in the absence of such a showing the charges should be dismissed. Dunlap v. Convening Authority, 23 C.M.A. 135, 138, 48 C.M.R. 751, 754 (1974).

[6] The Navy Court of Military Review has been especially vocal in its criticism. *See, e.g.*, United States v. Miller, 1 M.J. 1081 (N.C.M.R. 1977); United States v. Johnson, 1 M.J. 1104 (N.C.M.R. 1977); United States v. Brantley, 2 M.J. 594 (N.C.M.R. 1976); United States v. Wilcox, 3 M.J. 1120 (N.C.M.R. 1977).

[7] The Judge Advocate General of the Army has certified two cases to the Court of Military Appeals asking whether dismissal should be the sole remedy for a 91-day *Dunlap* violation in an error-free trial. United States v. Banks, Doc. No. 33,575 (C.M.A. 7 January 1977); United States v. Tucker, Doc. No. 36,518, 6 M.J. 5 (C.M.A. 1978).

[8] The staff judge advocate's written post-trial legal review of proceedings of all general courts-martial and some special courts-martial is required by the Uniform Code of Military Justice, art. 61 and art. 65(b) [hereinafter cited as UCMJJ, 10 U.S.C. § 861 and § 865 (b) (1976).

[9] United States v. Goode, 50 C.M.R. 1, 1 M.J. 3 (C.M.A. 1975). The *method* of service and the exact *form* of the proof of service is not prescribed. United States v. Lillie, 4 M.J. 907 (N.C.M.R. 1978). However, a mere notation of "copy to [defense counsel]" typed on the review is not enough. United States v. McWilliams, NCM 77-1880 (N.C.M.R. 14 February 1978) (unpub.). Most jurisdictions use a receipt form signed by the

defense counsel or a certificate of service signed by the staff judge advocate or an assistant.

[10] *Goode, supra;* United States v. Annis, 5 M.J. 351 (C.M.A. 1978).

[11] 1 M.J. 429 (C.M.A. 1976).

[12] *Id.* at 432. The UCMJ, art. 54 (c), 10 U.S.C. § 854(c) (1976), has always required service of the record of trial upon the accused, but speed was heretofore never really stressed. This rule corrects a bad practice which grew up in many jurisdictions by which service of the record of trial on the accused was given the lowest of priorities. In addition, *Cruz-Rijos* Broadens Article 54(c) to permit service of the record upon Defense Counsel in situations where the accused has been transferred or confined at a location different from that of the Defense Council.

[13] *Id.* at 431. The UCMJ, art. 54(a), 10 U.S.C. § 854 (a) (1976), has always required authentication by the military judge but permitted authentication by the trial counsel (or by the court reporter or a court member in specified instances) if the military judge was unavailable by reason of "death, disability or absence." "Absence," prior to *Cruz-Rijos,* was considered by many military lawyers to mean *routine* absences. *Cruz-Rijos* stopped the bad practice in many jurisdictions of routine authentication by trial counsel whenever the military judge was not immediately available. For a good compendium of cases defining 'unavailability" of the military judge, *see* United States v. Andrade, 3 M.J. 757 (A.C.M.R. 1977).

[14] 2 M.J. 86 (C.M.A. 1977).

[15] *Id.* at 93.

[16] Hereinafter referred to in the text as "C.M.A."

[17] United States v. Myhrberg, 2 M.J. 534 (A.C.M.R. 1976) *(en banc); but see* United States v. Thorpe, 3 M.J. 704 (A.C.M.R. 1977) where an individual panel of the court refused to waive a similar defect.

[18] United States v. Revels, SPCM 11745 (A.C.M.R. 24 August 1976) (unpub.)

[19] United States v. Thompkins, 2 M.J. 1249 (A.F.C.M.R. 1976). While "substantive requirements for post-trial reviews" is never really defined, the case involved the failure of the SJA to opine that the evidence was sufficient to sustain the finding of guilt *beyond a reasonable doubt. See also,* United States v. Robinson, 1 M.J. 722 (A.F.C.M.R. 1975).

[20] United States v. Salinas, NCM 76-0198 (N.C.M.R. 11 June 1976) (unpub.); United States v. Brunelle, NCM 76-0409 (N.C.M.R. 30 June 1976) (unpub.), *reversed on other grounds,* 5 M.J. 424 (C.M.A. 1978).

[21] Brunelle, *supra;* Early, J., *Dissenting in* United States v. Robinson, 1 M.J. 722 (A.F.C.M.R. 1975).

[22] United States v. Barnes, 3 M.J. 406 (C.M.A. 1977). Here, the staff judge advocate in his review allegedly failed to delineate the elements of the offenses, failed to relate the evidence to the elements, made no mention of the fact that a portion of the testimony at trial against the accused was from accomplices of the accused, and summarized evidence on offenses of which the accused was acquitted. For another waiver case decided the same day, *see* United States v. Morrison, 3 M.J. 408 (C.M.A. 1977).

[23] SPCM 11727 (A.C.M.R. 27 July 1976) (unpub.) (slip op. at 2).

[24] *See, e.g.;* United States v. Goode, 50 C.M.R. 1, at 4 n.1 M.J.3, at 6 n.1 (C.M.A. 1975); United States v. Thomas, 2 M.J. 263 (A.F.C.M.R. 1975); United States v. Mercier, 5 M.J. 866 (A.F.C.M.R. 1978).

[25] UCMJ art. 35, 10 U.S.C. §835 (1976). This article affords accused a three-day or five-day notice period in peacetime between service of charges and the commencement of special or general courts-martial, respectively.

[26] Defense requests for delay should be granted. United States v. Rothrock, 3 M.J. 776 (A.C.M.R. 1977), *pet. denied,* 3 M.J. 483 (C.M.R. 1977), even if the delay extends beyond the *Dunlap* 90 day period, United States v. Huffstetler, 4 M.J. 890 (N.C.M.R. 1978). However, the delay should be granted for a time certain, subject to further extension for good cause shown. United States v. Paige, 6 M.J. 529 (A.C.M.R. 1978).

[27] United States v. Mercier, 5 M.J. 866 (A.F.C.M.R. 1978). *See also* United States v. Forsyth, SPCM 11727 (A.C.M.R. 27 July 1976) (unpub.) which says: "If [defense counsel] does not respond or obtain a valid extension of time *within* the five allowable days, the Government has an unqualified *right* to present the review to the convening authority for his final action." (emphasis in opinion) (slip opinion at p. 2).

[28] 2 M.J. 86 (C.M.A. 1977).

[29] *Id.* at 93. The case also mandated that when apellate defense counsel was active in the case "an application should be made to the judge or court then having jurisdiction of the cause to be relieved of the duty of further representation of the convicted accused." In the two years since *Palenius* was decided only a handful of such applications have been received and processed by the Army Court of Military Review. This facet of *Palenius* is thus, being all but ignored by Army defense counsel.

[30] 1 M.J. 429 (C.M.A. 1976).

[31] *Id.* at 432.

[32] United States v. Cruz, 5 M.J. 286, 288 (C.M.A. 1978). Note that *access* to the record of trial by defense counsel is required is every case and not *service* of the rec-

ord of trial. There is one unpublished Army Court of Military Review case—United States v. Wormley, CM 431296 (A.C.M.R. 1975)—cited in *Cruz-Rijos, supra* at 1 M.J. 432, requiring *service* of the record of trial on defense counsel, but C.M.A. refused to go that far in *Cruz-Rijos*.

[33] 5 M.J. 440 (C.M.A. 1978).

[34] *Id.* at 442-43.

[35] 5 M.J. 454 (C.M.A. 1978).

[36] *Id.* at 455. *Accord:* United States v. Guilbault, 6 M.J. 20 (C.M.A. 1978).

[37] *See* Misc. Doc. 78-201, October 17, 1978, *Appeals-Summary Dispositions*, 6 M.J. 48-62 (C.M.A. 1978). Each case carries a short exposition of the facts and an order of the court—and most have a dissent by Judge Cook.

[38] *See, e.g.*, United States v. Curtis, 6 M.J. 48 (C.M.A 1978); United States v. Barnes, 6 M.J. 50 (C.M.A. 1978); United States v. Campbell, 6 M.J. 51 (C.M.A. 1978); United States v. Traylor, 6 M.J. 57 (C.M.A. 1978).

[39] *Id.*

[40] The author has contacted several of the trail defense counsel who have received cases back for their rebuttal of the review. The almost unlimited duration of the attorney-client relationship after trial is not without criticism. *See, e.g.* Cook *dissenting* in most of the 13 summary disposition cases cited in n.37, *supra*. Also, one panel of the Army Court of Military Review has urged C.M.A. to reconsider this issue, making persuasive argument for such reconsideration. *United States v. Johnson*, 6 M.J.——— ——— (A.C.M.R. 12 December 1978).

[41] United States v. Hill, 3 M.J. 295 (C.M.A. 1977); United States v. Brunelle, 5 M.J. 424 (C.M.A. 1978). The test-for-prejudice rule followed by some panels of the courts of military review (whereby the courts would look for errors in the review after finding noncompliance with *Goode*) is now dead. *See, e.g.*, United States v. Kirkland, 4 M.J. 789 (N.C.M.R. 1978); United States v. Jones, 4 M.J. 545 (A.C.M.R. 1977); United States v. Johnson, 5 M.J. 664 (A.C.M.R. 1978). *But see* United States v. Devins, 5 M.J. 504 (A.C.M.R. 1978), *pet. denied*, 5 M.J. 26 (C.M.A. 1978).

[42] *See, e.g., Hill, Kirkland, Jones* and *Johnson, supra.*

[43] *See, e.g.*, United States v. Brown, 5 M.J. 454 (C.M.A. 1978).

[44] *See, e.g.*, United States v. Brunelle, 5 M.J. 424 (C.M.A. 1978) where dismissal was ordered after C.M.A. determined that continuation of the judicial proceedings was not warranted.

[45] United States v. Iverson, 5 M.J. 440 (C.M.A. 1978) at 443.

[46] United States v. Iverson, *supra;* United States v. Davis, 5 M.J. 451 (C.M.A. 1978); United States v. Brown, 5 M.J. 454 (C.M.A. 1978); United States v. Kindlon, 6 M.J. 52 (C.M.A. 1978); United States v. Offenheiser, 6 M.J. 56 (C.M.A. 1978).

[47] United States v. Iverson, *supra*, at 442-43.

[48] United States v. Zarate, 5 M.J. 219 (C.M.A. 1978); United States v. Hahn, 5 M.J. 723 (A.C.M.R. 1978); United States v. Burke, 4 M.J. 530 (N.C.M.R. 1977). Accused may in some cases retain the military counsel as civilian counsel after that lawer's separation from military service. See N. 60, *INFRA*.

[49] United States v. Curtis, 6 M.J. 48 (C.M.A. 1978) (reassignmentgermay to Fort Gordon); United States v. Barnes, 6 M.J. 50 (C.M.A. 1978); United States v. Covert, 6 M.J. 55 (C.M.A. 1978).

[50] United States v. Jeanbaptiste, 5 M.J. 374 (C.M.A. 1978).

[51] United States v. Annis, 5 M.J. 351 (C.M.A. 1978). The leave was in conjunction with reassignment to a new duty station.

[52] United States v. Iverson, 5 M.J. 440 (C.M.A. 1978) *citing* United States v. Eason, 21 C.M.A. 335, 339, 45 C.M.R. 109, 113 (1972).

[53] *See, eg.*, United States v. Barnes, 6 M.J. 53 (C.M.A. 1978) where C.M.A., because there was "no showing in the record nor any contention by Government counsel that defense counsel was actually unavailable for service," found interference with the existing attorney-client relationship by the appointment of substitute counsl and sent the case back for a new rebuttal opportunity. The same wording appears in United States v. Flowers, 6 M.J. 54 (C.M.A. 1978); United States v. Lawrence, 5 M.J. 56 (C.M.A. 1978); United States v. Traylor, 6 M.J. 57 (C.M.A. 1978); and a similar sentiment is expressed in United States v. Ray, 6 M.J. 60 (C.M.A. 1978).

[54] United States v. Curtis, 6 M.J. 48 (C.M.A. 1978).

[55] *Id.* at 50.

[56] UCMJ, art. 32, 10 U.S.C. §832 (1976).

[57] United States v. Franklin, 3 M.J. 785 (A.C.M.R. 1977); United States v. Hathaway, 3 M.J. 1073 (A.C.M.R. 1977); United States v. Stith, 5 M.J. 879 (A.C.M.R. 1978).

[58] United States v. Stith, *supra*.

[59] United States v. Annis, 5 M.J. 351 (C.M.A. 1978); United States v. Burke, 4 M.J. 5)0 (N.C.M.R. 1977).

[60] United States v. Annis, *supra. Civilian* defense counsel have the same responsibilities under *Palenius* as

do *military* defense counsel. United States v. Jeanbaptiste, 5 M.J. 374, 378 (C.M.A. 1978) (Perry *concurring* and Fletcher *dissenting*). In addition, the accused may retain his or her former military defense counsel as civilian counsel when that lawyer leaves military service. United States v. Andrews, 21 C.M.A. 165, 44 C.M.R. 219 (1972). There may be an ethical issue in such representation by former military counsel, however. *See* ABA code of professional responsibility, DR 9-107(B) and additional citations therein.

[61] United States v. Iverson, 5 M.J. 440, 443, n.6 (C.M.A. 1978) specifically sanctions such procedure. *See also* United States v. Jeanbaptiste, 5 M.J. 374 (C.M.A. 1978).

[62] United States v. Staley, 2 M.J. 903 (A.C.M.R. 1976). It should be noted that the Navy Court of Military Review places the responsibility for keeping the Government informed of changes of address and location upon trial defense counsel. The Government, said the N.C.M.R., is clearly warranted in relying upon defense counsel's last known address in mailing the review to defense counsel. United States v. Brown, NCM 78-0406 (N.C.M.R. 26 June 1978) (unpub.).

[63] United States v. Williams, CM 435110 (A.C.M.R. 13 May 1977) (unpub.).

[64] In United States v. Jeanbaptiste, 5 M.J. 374 (C.M.A. 1978), three views are apparent: Judge Cook would serve *either* military *or* civilian defense counsel; Judge Perry would serve *both* counsel, but service upon one presumes coordination of all defense counsel in the rebuttal effort; and, Chief Judge Fletcher would require service on civilian counsel as prime counsel. In the courts of military review opinion varies. Service upon only the military counsel was permitted even when civilian counsel asked for the review in one case. United States v. Johnson, 3 M.J. 623 (N.C.M.R. 1977). *See also* United States v. Rothrock, 3 M.J. 776 (A.C.M.R. 1977), *pet. denied*, 3 M.J. 483 (C.M.A. 1977).e see CVOOK, *dissenting in* United States v. Montiel, 3 M.J. 873 (A.C.M.R. 1977) for a well-reasoned argument for service upon civilian counsel.

[65] United States v. Meyer, 1 M.J. 755 (A.F.C.M.R. 1975); United States v. Rasmussen, 4 M.J. 513 (C.G.C.M.R. 1977) (*see* the concurring and dissenting opinions in this latter case for differing views on the point).

[66] United States v. Meyer, *supra;* United States v. Goad, 5 M.J. 511 (A.C.M.R. 1978).

[67] C.M. A. has suggested the necessity of re-serving defense counsel after SJA's rejoinder, where the rejoinder contains new information. See United States v. Harrison, 5 M.J. 34, 35 n.1. (C.M.A. 1978). In addition, where the rejoinder is erroneous or misleading, the appellate courts will grant relief. United States v. United States v. Lehman, 5 M.J. 740 (A.F.C.M.R. 1978); Meyer, *supra*. United States v. Garrett, NCM 77-1195 (N.C.M.R. 27 January 1978) (unpub.); United States v. Hardesty, 1 M.J. 780, 782 (A.F.C.M.R. 1976) (Early, J., *concurring). See also,* United States v. Bras, 3 M.J. 637 (N.C.M.R. 1977).

[69] United States v. Garrett, *supra*.

[70] United States v. Goad, 5 M.J. 511 (A.C.M.R. 1978).

[71] *See* DA Message, DAJA-CL 1978/5495, 26 April 1978.

[72] United States v. Dubay, 17 C.M.A. 147, 37 C.M.R. 411 (1967).

[73] United States v. Robinson, 1 M.J. 914 (N.C.M.R. 1976); United States v. Johnson, 5 M.J. 664 (A.C.M.R. 1978).

[74] The five-day *Goode* period does not extend the *Dunlap* 90 day period and is included within the 90 days. United States v. Goode, 50 C.M.R. 1, 4 n.1, 1 M.J. 3, 6 n.1 (1975). The *Dunlap* 90-day rule is described at n.5, *supra*.

[75] United States v. Leonard, 3 M.J. 214 (C.M.A. 1977); United States v. Rothrock, 3 M.J. 776 (A.C.M.R. 1977), *pet. denied*, 3 M.J. 483 (C.M.A. 1977); United States v. Huffstetler, 4 M.J. 890 (N.C.M.R. 1978); United States v. Paige, 6 M.J. 529 (A.C.M.R. 1978).

[76] United States v. Ledbetter, 2 M.J. 37 (C.M.A. 1976).

[77] *Id.* at 40.

[78] United States v. Sawyer, 4 M.J. 64, 65 n.3 (C.M.A. 1977); United States v. Wilcox, 3 M.J. 1120 (N.C.M.R. 1977).

[79] An accused is to be sent to Fort Riley or Fort Leavenworth normally within 15 days following the court-martial unless "exceptional circumstances, as determined by the General Court Martial Convening Authority, warrant deferring transfer." Army Regulation No. 190-47, para. 4-9*b* (1 October 1978).

[80] 10 U.S.C. §857 (d) (1976).

[81] United States v. Ledbetter, *supra* at 41.

[82] MCM, 1969, para. 88*e*(1); United States v. Franklin, 41 C.M.R. 431 (A.C.M.R. 1969).

[83] United States v. Weishaar, 5 M.J. 889 (N.C.M.R. 1978). *SEE ALSO* The same philosophy regarding "interion actions" in United States v. Thomas, 2 M.J. 263 (A.F.C.M.R. 1976).

[84] MCM, 1969, para. 88.

[85] Dunlap v. Convening Authority, 23 C.M.A. 135, 48 C.M.R. 751 (1974). It would appear that *any combination* of confinement and a lesser form of restraint amounting to more than 90 days raises the presumption of a violation of the accused's right to speedy post-trial processing of the case.

[86] United States v. Burton, 21 C.M.A. 112, 44 C.M.R. 166 (1971).

[87] United States v. Bryant, 3 M.J. 396 (C.M.A. 1977); United States v. Baez Martinez, 3 M.J. 788 (A.C.M.R. 1977).

[88] Perhaps herein lies an argument for modification of *Dunlap* to permit sanctions less severe than dismissal. A less severe sanction, such as reassessment of sentence, would preclude intentional noncompliance with *Goode*. As the law now stands, the staff judge advocate has no choice but to ignore *Goode* when faced with a 90-day problem. The opportunity for C.M.A. T modify the *Dunlap* sanction is presently on the Court's docket. See N. 7, *supra*.

[89] United States v. Bowen, 2 M.J. 244 (A.F.C.M.R. 1976); United States v. Thomas, 2 M.J. 263 (A.F.C.M.R. 1976); United States v. Baughcum, 4 M.J. 536 (N.C.M.R. 1977), *pet. denied*, 5 M.J. 263 (C.M.A. 1978); United States v. Reed, CM 434451 (A.C.M.R. 29 December 1977) (unpub.). It is sometimes suggested that defense counsel be given *less* than five days to respond to the staff judge advocate's review, thus permitting the opportunity—albeit shortened in length—to respond while at the same time complying with *Dunlap*. In light of the absolute nature of the five-day period, a shortened *Goode* period merits the same saction as no opportunity at all. *See* cases cited at nn. 23 and 24, *supra*.

State Jurisdiction in Child Abuse Cases

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The issue of application of state law to land areas of exclusive Federal jurisdiction often arises in connection with child abuse matters occurring on post. The question may arise whether there is a simple, standardized answer or approach to the problem of interaction between local state child protection authorities and the Federal enclaves. In view of the large number of Federal installations located in states across the country, it is understandable to think that this issue has arisen numerous times before and that a "textbook" solution has been devised. Unfortunately, it appears that such a solution does not exist. Efforts to determine a standardized approach to this subject have been unsuccessful. Consultation with several Army installations, the Health Services Command, and the Office of The Judge Advocate General (Administrative Law Division) has led to the conclusion that the interaction between state and Federal authorities in child abuse matters is handled strictly on an installation-by-installation basis. The determinative factor appears to be willingness of the local county child protection agency to accept and process cases occurring on the Federal installation. If necessary, the legal justification for such action is thereafter devised locally. The discussion given below presents several arguments supporting application of state child abuse laws to land areas of exclusive Federal jurisdiction.

Army Regulation 600-48, *Army child Advocacy Program (ACAP)*, and Army Regulation 608-1, *Army Community Service Program*, which replaced AR 600-48 effective 1 October 1978, provide only guidance as to personnel responsibilities and general policy considerations in the areas of child neglect and abuse. Those regulations contain very little regarding detailed procedures for use in cases of child abuse (except for certain medical procedures to be followed in treatment). Specific authority for personnel to take protective action, if necessary, in child abuse cases is not given. Normally, state law sets forth comprehensive procedures dealing with child abuse and suspected child abuse cases, and that law often affords immunity to persons acting in good faith in connection with the reporting of suspected child abuse or the taking of an abused child into protective custody. Frequently, state law also provides for and requires involvement by the local department of social services, and sets forth express authority to utilize protective custody in certain cases of suspected abuse or mistreatment. Because no adequate or specific Federal procedures currently exist or apply in child abuse cases occurring on a Fed-

eral reservation, it is usually beneficial for the military community to utilize state law and procedures. Moreover, cooperation with appropriate civilian agencies is contemplated and encouraged by AR 608-1.

With the foregoing as background, the principal jurisdiction question is whether state laws regarding child abuse can be applied to areas of exclusive Federal jurisdiction. That question may properly be answered in the affirmative, and the purpose of this jurisdictional discussion is to present the reasons justifying that answer. This reasoning in favor of state jurisdiction may be utilized in response to a challenge that state law cannot or should not apply to a Federal military installation.

The United States normally has exclusive jurisdiction over housing and other land areas on a Federal military reservation. Portions of the reservation may be deeded outright to the United States by private individuals. Lands acquired from the surrounding state are usually obtained by way of cessions to the Federal government, and the state legislative acts transferring those lands to the United States usually contain no express conditions or restrictions regarding application of state law to the areas in question. States merely reserve the right to serve process, civil or criminal, in the areas ceded to the United States. Therefore, with regard to areas of exclusive Federal jurisdiction, the issue relating to application of the state child abuse law must be analyzed in light of basic principles of constitutional law.

As a general rule, state law (both civil and criminal) applies to land areas in which the United States has only a proprietorial interest, and Federal law applies to lands under exclusive Federal jurisdiction. When the land in question is under exclusve Federal jurisdiction, state civil laws normally have no operation or effect. The United States is the supreme legislative sovereign in that situation. Frequently, Federal statutes will adopt or apply state rules of law for such areas, or a purely Federal law will be enacted. However, in many important legal areas Congress has neither enacted comprehensive civil statutes nor specifically adopted a state civil law. Those areas of Federal legislative void include domestic relations matters, and matters between parent and child. The area of child abuse also appears to be an area without specific Federal legislation.

An examination of Federal law reveals that Congress has determined not to assert jurisdiction in the area of child abuse. The only Federal legislation in this area is the Child Abuse Prevention and Treatment Act, Title 42, US. Code, sections 5101--5106 (enacted 1974, amended 1978). That act merely provides for the creation of research and data gathering agencies, and funding to states which establish appropriate programs for the handling of child abuse. While Congress could legislate in the area of child abuse on Federal enclaves, it has not done so. Under those circumstances, it is apparent that Congress recognizes the problem of child abuse and has decided to act solely by providing funds to the states so that they may deal with the problem.

Whenever there is an absence of specific Congressional statutory action, it must then be decided what law applies to the Federal area in question. In *Chicago, Rock Island & Pacific Railway Company v. McGlinn*, 114 U.S. 542 (1885), the United States Supreme Court was confronted with that issue and held at page 546 as follows:

> It is a general rule of public law, recognized and acted upon by the United States, that whenever political jurisdiction and legislative power over any territory are transferred from one nation or sovereign to another, the municipal laws of the country, that is, laws which are intended for the protection of private rights, continue in force until abrogated or changed by the new government or sovereign.

There have been many applications of the *McGlinn* doctrine since it was enunciated. Subsequent court decisions have refined and reaffirmed that proposition. State civil laws existing at the time the United States acquires exclusive jurisdiction are automatically adopted for the area in question, so long as those state

laws do not conflict with existing Federal law, and until Congress passes laws inconsistent with the state law. See, *In Re Kernan*, 288 NY Supp 329 (1936), and cases discussed therein.

However, in the area of child abuse, the usual situation is that no adequate or specific state law on the subject existed at the time of acquisition of the Federal lands in question. Effective regulation against child abuse requires current procedures, which are meaningful in today's society and which have been established in light of contemporary problems and family pressures. The absence of such a state law at the time of the land acquisitions in question would, theoretically, mean that the subject of child abuse is simply unregulated in those areas. That situation is usually undesirable and unacceptable. Fortunately, current state child abuse laws may properly be applied to areas of exclusive Federal jurisdiction. The several reasons and arguments supporting that proposition are discussed immediately below.

One such argument is briefly stated. In 1963 the United States Supreme Court in *Paul v. United States*, 371, U.S. 245 (1963), held that the state law applied in a Federally unregulated land area of exclusive U.S. jurisdiction (*i.e.*, the *McGlinn* situation) may be the *current* state law if some form of state regulation of the subject existed at the time of acquisition of the land by the United States. *Paul* dealt with regulation of milk prices in California, and a different (but similar) scheme of regulation existed when the lands in question were transferred. Therefore, although distinguishable on its facts, current law was utilized in *Paul*. Consequently, that decision is in support of the argument that currently existing state child abuse laws could be applied to an otherwise unregulated area of exclusive Federal jurisidiction.

A second justification for state jurisdiction deals with the nature of the "Federal enclave." Early court decisions viewed the Federal enclave as an entity totally separate and apart from the state in which it was located in order to preclude any exercise of legislative authority by the state over the enclave. Most of the early cases dealt primarily with state regulatory type legislation which impacted directly upon the Federal government and its operations. In what appears to have been the first case before the U.S. Supreme Court involving state law which did not impact adversely upon the Federal government, the Court in *Howard v. Commissioners*, 344 U.S. 624 (1953), specifically rejected the concept of a state within a state and noted that the Federal enclave continued to be a part of the state within which it was located. The Court further noted at pages 626–627 that:

> The fiction of a state within a state can have no validity to prevent the state from exercising its power over the Federal area within its boundaries, so long as there is no interference with the jurisdiction asserted by the Federal Government. The sovereign rights in this dual relationship are not antagonistic. Accomodation and cooperation are their aims.

Therefore, a Federal military reservation may be considered part of the state in which it is located. Consequently the state may properly apply and enforce its child protection laws on the installation's areas of exclusive Federal legislative jurisdiction. Not only is there no interference with a Federal assertion of jurisdiction, but such state action is in furtherance of a clear Federal policy expressed in the Child Abuse Prevention and Treatment Act.

The third justification for state jurisdiction is, perhaps, the strongest and most persuasive. Because child abuse legislation confers a benefit on abused and neglected children, the cases dealing with the rights of Federal enclave residents to benefits of state law are relevant. The leading case in this area is *Evans v. Cornman*, 398 U.S. 419 (1970), wherein the United States Supreme Court held that the State of Maryland would violate the equal protection clause of the Fourteenth Amendment if it denied state voting rights to Maryland domiciliaries living on the grounds of the National Institute of Health, a Federal enclave. The right to vote, considered the citizen's link to his laws and government, and protective of all fundamental rights

and privileges, is quite special when compared with other privileges. *Evans* at least raises the question whether a state can deny benefits to residents of a Federal enclave without violating the equal protection clause of the Fourteenth Amendment. Given that the Supreme Court in *Howard* v. *Commissioners* rejected the "fiction of a state within a state" (a holding reaffirmed in *Evans*), a state legislative scheme which denies benefits to enclave residents, persons residing within the state, would be subject to attack unless the state could establish a rational basis.*

Several state courts have acknowledged the right of Federal enclave residents to benefits conferred under state law by holding that enclave residents are residents of the city, county, and state in which the installation is located. The courts have relied upon the rationale of *Howard v. Commissioners*, where the concept of the Federal installation being a state within a state was rejected. The exclusive Federal legislative jurisdiction issue was resolved by relying upon the lack of interference with a Federal assertion of jurisdiction in the applicable areas (as would be the situation in the area of child abuse).

The Supreme Court of West Virginia in *Adams v. Londeree*, 139 W.Va. 748, 83 SE 2d 127 (1954), prior to *Evans v. Cornman*, upheld the right of a Federal enclave resident to run for local office where the state constitution provided that only qualified voters could be candidates and that a person had to be a resident of the state for one year to be a qualified voter. The Supreme Court of Colorado in *County of Arapahoe v. Dunoho*, 144 Colo. 321, 356, P 2d 267 (1960), upheld the right of an enclave resident to benefits under a state law which provided for payment of relief benefits to residents "in the county." While noting that relief benefits were paid for in part with Federal funds, the Court states at pages 273 and 274 (P. 2d):

> Therefore, in view of the fact that "exclusive legislative" jurisdiction does not operate as an absolute prohibition against state laws but has for its purpose protection of federal sovereignty, we conclude that it does not operate to prohibit the payment of relief to a resident of Fort Logan. The conferring of a benefit required by federal law cannot be construed as an act which undermines federal sovereignty. Indeed by paying relief in these circumstances the federal policy to recognize citizens of the United States is fostered and promoted. . .
>
> We see no clear conflict between the terms of the state law and the exercise of necessary functions in carrying out the program, in the light of the geographical location of Fort Logan. Perhaps the most persuasive factor in evaluating the contention of possible federal interference is the federal statute, 42 U.S.C.A. para 1352(b), supra. It is illogical to suppose that the federal government would interfere with the county carrying out a program contemplated by federal statute.

That reasoning would apply equally well to the area of child abuse wherein the Federal government provides financial support to the states to carry out appropriate child protection functions.

Other states, notably New Jersey, have acknowledged the right of enclave residents to benefits under state law where no specific residency requirement exists in the statute conferring the benefit. The New Jersey Superior Court has considered the applicability and enforceability of state law in areas of exclusive Federal legislative jurisdiction, and in *Board of Chosen Freeholders of the County of Burlington v. McCorkle*, 98 N.J. Super. 451, 237 A 2d 640 (1968), determined that children residing at Fort Dix and McGuire Air Force Base, both exclusive Federal jurisdiction installations, were entitled to benefits provided by the New Jersey Bureau of Children's Services. The Bureau was required under state law to provide care, custody, maintenance, and protection for children found to be dependent and neglected. In reaching its decision the Court followed the reasoning of *Howard v. Commissioners*, and concluded that the term "exclusive

jurisdiction" does not mean an absolute bar to the exercise of legislative authority by the state. The Court determined that state jurisdiction exists so long as its exercise does not interfere with the jurisdiction asserted by the Federal government. Notably, the Court then specifically stated that the Federal government had not asserted jurisdiction in child abuse matters, and in fact had provided Federal funding to New Jersey to enable it to deal with the problem through its agencies. The same court also ruled in *State in Interest of D.B.S.*, 349 A 2d 105 (N.J. Super., 1975), that the State of New Jersey had an obligation to protect and rehabilitate a juvenile who, although housed on land ceded to the Federal government, is still a member of the social community of New Jersey.

In conclusion, the Supreme Court's determination in *Howard v. Commissioners* that a Federal installation is a part of the state within which it is located would seem to dictate that a child present on the installation is "in the state" for purposes of the child abuse law. Therefore, absent any jurisdictional impediment, a child on the installation is entitled to the protection of the state law. Because the exercise of state jurisdiction in this area does not interfere with any Federal assertion of jurisdiction, and in fact is quite consistent with expressed Congressional policy, there appears to be no jurisdictional impediment. Moreover, the rationale of *Adams v. Londeree, County of Arapahoe v. Dunoho*, and *Howard v. Commissioners*, would seem to support a Federal enclave resident's entitlement to the benefits of the state law. An enclave resident is considered to be a resident of the state, and the denial of benefits to child residents of the Federal enclave would, therefore, run afoul of the equal protection mandate of the Fourteenth Amendment. Consequently, it may be concluded that state child abuse laws apply to residents of a military installation comprised of land areas of exclusive Federal jurisdiction.

The arguments given above present strong justification for such a course of action. Furthermore, it is doubtful that any judge faced with this issue would ignore the best interests of the child in question and deny the protections of the law to an abused child who would otherwise remain unprotected. A child present on or residing at a Federal military installation may legitimately claim the protections and benefits of the applicable state child abuse laws.

Footnote

*It is doubtful that the state would be required to establish a compelling governmental interest. Unlike the *Evans* case, fundamental rights are not at stake; and, therefore, the burden of proof to justify discrimination is lower.

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JAG-2, YOU, and ARTOO DEETOO (R2D2)

Captain Nicholas P. Retson

You are a fairly successful lawyer. At age 38 you have done quite well for yourself—you are the senior partner of a large law firm! Your firm specializes in trial litigation, torts, and criminal law; has a large general practice; and the city government of a municipality of 35,000 people is your biggest client. That client requires additional specialized legal advice in en-

vironmental law, labor law, international law and more.

Your firm has 12 attorneys, 4 legal secretaries, 3 support personnel, and an office manager. It requires 4,000 square feet of office space, 20 phones, a WATS line, a telex, a law library of 1,500 volumes, 20 desks, a car, a reproduction machine, 10 typewriters, 17 dictation sets, a word processing machine and much more. To get good help you actively recruit nationwide for new lawyers. You provide a medical plan, a retirement plan, a liberal vocation plan, and fund attendance at Continuing Legal Education courses.

You conservatively figure break-even costs at $650,000 per year. The personnel costs alone are a staggering $376,600. And you have not even figured in all the other costs of doing business—administering employee pay records, employer's contribution to social security, office supplies, sick days, pro bono work, utilities, witness fees, travel costs, etc. At $40.00 per hour you need to bill 16,250 hours of work each year before you can even think about your own salary!

What is that? You say that things are going to get worse! Oh, I see. A "Proposition 13" tax referendum was just passed in the local election and the city manager wants you to do twice as much work for the same fee as last year. He even wants you to run the city's new public defender program. Inflation is running 10% a year, your secretaries all want raises, your experienced attorneys are leaving, and your office equipment is old! . . . Oh well.

Does that scenario seem familiar? It should! While it might appear to depict a medium sized civilian law firm, it is actually based on estimated annual costs from the Table of Organization and Equipment for a Division Staff Judge Advocate's Office.

Profitably managing such an office, or at least managing it within the limits of an Army budget, requires skilled managers with ready access to current information that assists decision making. The JAG Corp's reliance on "stubby pencil" data reports, and managers with little formal management training, would probably result in business failure for a civilian law firm run the same way.

The primary purposes of this article are to point out existing weaknesses in JAG Corps management data collection techniques and to propose the establishment of a computerized management information system which can correct those weaknesses. The proposed system—tailored for use at all management levels—is designed specifically to help the JAG Corps effectively allocate existing resources while justifying changes for future growth.

Although not directly parallel, the problems of a JAG Corps office are very often the same problems facing a civilian law firm—salaries, benefits, case load, cost justification, client desires, court deadlines, etc. Both types of offices require that management decisions be made daily; and although the JAG Corps does not "bill out" its time, it must continually justify the need for each attorney, each clerk, and each piece of equipment. Today's belt-tightening economy also requires that both the JAG Corps lawyer and the civilian practitioner place increased emphasis on examining the cost factors of doing business.

Decision-making in the JAG Corps also closely parallel decision-making in civilian firms. Policy decisions made by TJAG (senior partner) or local SJAs (managing partners) define scope of mission; while managerial decisions made at all levels of the Corps put assets to work completing those missions. To accurately decide policy and other managerial matters, the JAG Corps, like the civilian law firm or business, needs information upon which to base those decisions. By looking at the JAG Corps the same way that a civilian firm looks at itself, we can have a beneficial effect on our legal practice. To avoid the overwhelming desire to equate everything to a civilian business we must keep in mind the four main differences between JAG Corps and civilian practice of law: (1) our size, (2) our varied locations, (3) our inability to pick and choose clients, and (4) our bureacracy within which all levels of management must work.

Current Data Sources. There are three major sources of management data currently used by JAG Corps managers: (1) Department of the Army Reports, (2) Command or Local Reports, and (3) "Short-Fuse" Reports. The data provided by all three is currently limited in scope, inefficiently collected, and poorly analyzed. As a result, our managers are often too busy reinventing the wheel and dealing with "brush fire" problems to devote sufficient time to future planning.

The "Report of Criminal Activity and Disciplinary Infractions in the Armed Forces" is a good example of a DA Report. The report, required by Army Regulation 27-10 and commonly referred to as the "JAG-2 Report," is prepared quarterly by the SJA of each general court-martial jurisdiction. (Sample copy at Fig. 1.) The JAG-2 Report depicts statistics like the number of females who received summary court-martial (Line 5*b*), the total number of Article 15 appeals (Line 2,) or the number of special courts-martial tried without a military judge (Line 9*f*). While this information may be helpful in compiling the number of criminal actions occurring in the Army, the report does little, if anything, to show how many JAG Corps assets were expended in processing those actions. It also does little to show if our assets are used efficiently. An example of this problem can be illustrated by looking at Line 12 of the Report. Line 12 reports the "average number of days from restraint or charges to sentence or acquittal." If the number reflected on that line is small, the SJA of the command is often praised for having a "low case processing time"—even though he may have used two-thirds of his available assets for justice matters and fully neglected the other areas of JAG Corps practice. Because of its limited scope, the JAG-2 Report provides little real help to the manager who prepared it. It neither assists decision making regarding future asset allocations, nor does it help analyze the effectiveness of previous allocations.

Locally designed reports can be of some help to JAG Corps managers since they can be created to fit immediate needs. However, the same reports will be of little historical or long term management value because of the individual changes instituted everytime a new manager arrives. Local reports can never be compared effectively with JAG Corps wide report data when trying to measure overall internal office efficiency. They also require extra manpower locally for preparation and updating. The extra manpower problem is made more acute because many local reports are just repeating, in a different format, the same information reported elsewhere. Furthermore, JAG Corps managers generally do not have facilities or capabilities for analyzing thoroughly their own reports.

"Short fuse" reports requested at the last minute by higher headquarters are the most wasteful and inaccurate source of current JAG Corps management data. Many manhours are wasted trying to reconstruct (construct?) nonexisting management information in response to such requests. Not only is the requested information often unavailable, but the preparing office may spend extra time trying to guess why a higher headquarters wants the data. If the guess is wrong the reconstructed data may be slanted to present an inaccurate picture of the problem the higher headquarters is trying to resolve.

The current management reporting system's limited scope and piecemeal nature of data collection present an unreliable picture of the JAG Corps' workload and asset allocation. A good management system should be integrated and comprehensive, and provide management with a clear picture of the Corps' actual business posture. The system should allow any manager—TJAG, SJA, or Administrative Law Section Chief—the ability to compare that office's current efficiency with a statistical, historical norm of that same office. It should also allow for statistical comparisons of similar offices while making allowances for the special problems of each independent office.

A modern management system should be able to measure current office efficiency, save time and money for all managers, and help avoid problems before they arise. The system should allow for statistical experimentation of

new office procedures, provide easy access to a broad range of requested data, and above all be an extension of the manager—not a replacement.

A Proposed Solution. The remainder of this article deals with a proposed management data system that could solve the problems alluded to above. The proposed system is called the Judge Advocate Management System (JAMS). It would be designed specifically to meet the current needs of the JAG Corps while providing flexibility for addressing future requirements. Implementation of this practical management tool should begin immediately.

The heart of the system would be a computer housed at the U.S. Army Legal Services Agency. The computer would receive reports from the field; collate, store, and analyze new data; and periodically provide JAG Corps managers with reports for local use.

For management purposes, the JAG Corps would begin to look at itself more and more like a large international law firm divided into individual cost centers. The firm would be broken down into management centers for analysis and management purposes. A management center could be any desired level of asset management. For example, an individual, a legal assistance section, a division SJA office, a MACOM, or the whole JAG Corps could each be considered "management centers" for different purposes.

Individual attorneys will begin to be responsible for preparing their own weekly JAMS reports. The reports will become the major data imput vehicle for the system. The input reports will be transmitted to USALSA where the data would be entered into the JAMS computer. Once the data is entered, JAMS could routinely make management reports available to any definable management center.

The input reports would resemble billable hours sheets used by civilian law firms. They would measure not only the number and type of actions handled by an individual, but would also include for the first time in the JAG Corps an efficiency factor—the amount of JAG Corps time expended for a given type of action.[1]

Trial Defense Service's Experience. When the one year test of the U.S. Army Trial Defense Service (USATDS) began in May 1978, it instituted a "te an actions" reporting systems similar to that proposed for JAMS. Two reports are prepared monthly by each trial defense service office (i.e., management center). Management Report I (figure 2) is divided into two parts. Part I reflects a theoretical picture of the number of manhours potentially available to that management center during the report period, while Part II reflects the total number of hours of work actually performed. The hours reported in Part II are the totals from each of the six sections of Management Report II (figure 3). Each section represents one of the major functional work areas of defense counsel duties: Courts-Martial, Administrative Boards, Nonjudicial, Miscellaneous, SJA duty and Extra Manpower.

The reporting system proved to be highly effective. Accurate data was easily collected by all defense counsel and the information was collated and analyzed at USATDS Headquarters. Management decisions on availability of counsel, office size, manpower effectiveness, asset distribution, and problem areas were made from the data collected. Individual attorneys reported that they too benefitted by preparing the reports because they were better able to see how their own time was being spent.

The amount of information available to USATDS was limited not by the data sent in from the field, but by the lack of personnel to compile it manually. If automatic data processing equipment (ADP) were made available, USATDS would soon be able to provide additional monthly statistical reports to its field managers. If the USATDS' concept is implemented worldwide at the end of the test period, their current effective "time and actions" reporting system will have to be cut back due to the lack of ADP assistance.

What Could JAMS Do? For the SJA, JAMS would provide accurate, detailed, management

data while actually reducing local report preparation manhours. JAMS would begin by compiling a comprehensive statistical profile of each management center. Once the profile is prepared, the JAMS computer would automatically compare it with new input data and measure a center's current business posture and efficiency.

A team of management, legal, and computer experts would design monthly reports for JAG Corps managers. The team would program the computer to raise "red flags" on these monthly reports thus identifying specific problem areas for consideration by local managers. For example, the report might note that an extremely high percentage of assets is being expended on criminal matters in the management center while a constant, unnecessary backlog exists in the claims or administrative law sections. JAMS would be programmed not only to warn the SJA about upcoming excessive office personnel turnover periods, but could be set up to notify automatically the Personnel Plans and Training Office (PP & TO) too. Budget information could also be programmed.

JAMS can give the JAG Corps its first comprehensive data link for analysis of its highly technical mission. The system would provide OTJAG an opportunity not only to support local managers on a short term basis, but once implemented, also could provide accurate data for long term growth. Cost data to explore better methods of telephone, office equipment, and paralegal utilization would be available. Data for testing new case flow systems could be analyzed. For the first time the JAG Corps could take a technically critical look at itself and learn from that experience.

Implementing JAMS. Implementation of a system like JAMS could easily begin in the near future. It would, however, require the willingness of the JAG Corps to make an initial investment now in exchange for a long term return. A five phase implementation plan could be used for an orderly and efficient expansion of the system.

Phase I of that plan would include establishing a computer center at USALSA—something that is being accomplished on a limited scale right now. While USALSA completes the current changeover to ADP of its internal office record keeping requirements, USATDS could be using the same computer to continue its Management Reporting System. The USATDS system would become the first link in building the integrated JAMS program for the JAG Corps and would also provide opportunity for reevaluation of the "time and action" system before expanding implementation to Phase II.

Prior to moving into Phases II and III, JAG Corps management and computer experts would monitor and analyze the USATDS management data system. In addition, these professionals would assist in preparation of data collection reports for Phases II and III.

By 1980 JAMS could be expanded to include all military justice functions, including military judges (Phase II); then in 1981, the other JAG Corps functional areas would be added to the system: Administrative Law, Legal Assistance, Claims, Contracts, International Law, Miscellaneous, and Management (Phase III).

Phase IV, the all important "integration phase" could begin in late 1981. In this phase, the statistical bases previously developed within the various functional areas would be integrated to provide a complete picture of each JAG Corps Management Center. Comprehensive monthly reports prepared by JAMS would be sent to each manager for local use. Annual, historical data reports would also be prepared for long term planning. JAMS would then be able to provide statistical analysis of proposed JAG Corps management changes before they are implemented.

PP&TO functions could be added to JAMS in 1982 during Phase V. Monthly reports could reflect the impact of upcoming personnel changes in addition to providing PP&TO with better planning and operational capabilities.

What About the Future? The uses for a system like JAMS are by no means limited to those listed above. Additional data collection for manpower surveys could be eliminated. The number of locally prepared reports would be

reduced. Litigation Division, Contract Appeals Division, and the Claims Service could statistically cost out possible case settlement options. Government Appellate Division and Defense Appellate Division could actually prepare "military justice impact statements" for the Court of Military Appeals similar to those proposed by Rear Admiral William O. Miller.[2] Once a system—any integrated system—is implemented, data for cost studies would always be available. With readily available cost data, the JAG Corps could easily explore all kinds of innovative possibilities. for example, it could look at a system of communicating word processing centers so that lawyers at Fort Polk could do wills for Louisiana residents stationed at Fort Lewis; or OTJAG Litigation Division attorneys could send briefs to Fort Carson's word processing center in such a way that typists in Colorado would only be required to keyboard local changes. Expanded use of electronic research assistance could be investigated. All lawyers could have local access to WESTLAW[3], LEXIS,[4] JURIS[5] and FLITE;[6] and administrative law decisions could be added to a data base too. Computer assisted record of trial preparation could be explored. Court reporters, using stenotype machines, could type onto magnetic tape rather than paper. A computer could "translate" the tape so the local word processing machine would automatically print the first draft of the record of trial in minutes.

CONCLUSION. Although ARTOO-DEETOO, the little robot of Star Wars fame, providefast, accurate flight and battle data to fighter pilot Luke Skywalker, the final combat decisions were made by Luke himself. JAMS, like ARTOO-DEETOO, is clearly not the answer to all of the problems facing the JAG Corps. It could never be a substitute for good managers and quality leadership; nor would it obviate the need for common sense and foresight. But, as a management tool, as an expansion of the manager's senses, it can help us do more with what we have. It can help the JAG Corps improve its mission performance and readiness.

Implementation of a system like JAMS is becoming a must in this period of increasing military cost constraints and criticism of the JAG Corps' lack of adequate management data for efficient operation. The JAG Corps needs to plan alternatives for effective mission accomplishment under all possible conditions. Although the possibilities for the future of the Corps are endless, planning for that future must begin by building a comprehensive management tool like JAMS. A perfect opportunity now exists for the JAG Corps to take the first step into its future. That opportunity is the chance to implement immediately Phase I of JAMS while USATDS is in its infancy. The Corps must take that step.

FOOTNOTES

[1] Some managers feel that we should go totally to a civilian type timekeeping system, i.e., an accrual time system that bills time only to a specific client—specialist Four Jones's General Court-Martial, Captain Smith's household goods claim, Mrs. Johnson's will, *etc.* I prefer a "cash accounting" method of time-keeping, *i.e.*, billing the time to the general category of action or event—general courts-martial research, household goods claims, will drafting, *etc.*

[2] Miller, *Impact Statements for Military Justice Changes, The Army Lawyer,* May 1978, at 9.

[3] West Publishing Co.

[4] Mead Data Central, Inc.

[5] U.S. Department of Justice.

[6] Federal Legal Information Through Electronics. A DoD chartered system with operation and administration performed by the U.S. Air Force.

[7] GAO Report FPCD-78-16, October 31, 1978, "Fundamental Changes Needed to Improve the Independence and Efficiency of the Military Justice System."

REPORT OF CRIMINAL ACTIVITY AND DISCIPLINARY INFRACTIONS IN THE ARMED FORCES

For use of this form, see AR 27–10; the proponent agency is Office of The Judge Advocate General.

REPORTS CONTROL SYMBOL JAG–2(R10)

QUARTER ENDING	REPORT DATE

THRU: (Forwarding Command, include ZIP Code)

TO: HQDA (JAAJ–CC)
Nassif Building
Falls Church, Va 22041

FROM: (Preparing Office, include ZIP Code)

SECTION A – NONJUDICIAL PUNISHMENT

ITEM (a)	NUMBER OF PERSONS (b)
1. a. Total persons punished (Items 1b + 1c)	
b. Enlisted personnel	
c. Officer personnel	
2. Total number of appeals from punishment	
3. Number of appeals granted in whole or in part	
4. Number of persons who were offered but refused to accept Article 15	

SECTION B – SUMMARY COURTS–MARTIAL

ITEM (a)	NUMBER OF PERSONS TRIED (b)	NUMBER OF PERSONS CONVICTED (c)
5. a. Total number of summary courts-martial		
b. Number of females included in item 5a above		
6. Number included in item 5a who refused Article 15		
7. Number included in item 5a who pleaded guilty to all charges and specifications		

SECTION C – SPECIAL COURTS–MARTIAL

ITEM (a)	NUMBER OF PERSONS TRIED (b)	NUMBER OF PERSONS CONVICTED (c)
8. a. Total number of special courts-martial (8b + 8c)		
b. Enlisted personnel		
c. Officer personnel		
9. a. Number included in 8a who were females		
b. Objected to trial by summary court-martial		
c. Objected to trial by summary court-martial and to Article 15 punishment		
d. Waived right to qualified detailed defense counsel		
e. Requested qualified detailed defense counsel but such counsel declared not obtainable (outside CONUS only)		
f. Were tried by a court-martial to which no military judge was appointed		
g. Were sentenced to a BCD		

SECTION D – GENERAL COURTS–MARTIAL

ITEM (a)	NUMBER OF PERSONS TRIED (b)	NUMBER OF PERSONS CONVICTED (c)
10. Total number of general courts-martial		

SECTION E – PROCESSING TIME FOR COURTS–MARTIAL

ITEM (a)	SCM (b)	*SPCM (c)
11. Number of cases received		
12. Average number of days from restraint or charges to sentence or acquittal		
13. Average number of days from sentence to action by convening authority		
14. Average number of days from convening authority's action to receipt by SJA		

* Only those SPCM's not forwarded for review by a Court of Military Review UP Art. 65 (b) UCMJ, will be reported here.

SECTION F – DISPOSITION OF DRUG ABUSE OFFENSES

ITEM (a)	NUMBER OF PERSONS (b)
15. Nonjudicial punishment	

ITEM (c)		NUMBER OF PERSONS TRIED (d)	NUMBER OF PERSONS CONVICTED (e)	NUMBER OF TRIALS (f)
16. Courts-martial	a. Summary			
	b. Special			
	c. General			

SECTION G – CIVILIAN FELONY CONVICTIONS

17. U.S. Federal and State Courts (Felony *Convictions)	NUMBER

*A conviction is reportable when the offense is a felony under the law of the jurisdiction in which the accused was convicted.

REMARKS (Continue on reverse)

TYPED NAME, GRADE, AND TITLE	SIGNATURE

DA FORM 3169–R, 1 Oct 75

REPLACES EDITION OF 1 NOV 73, WHICH IS OBSOLETE.

Figure 1

USATDS MANAGMENT REPORT I

Mngmnt Center __ __ : __ __ __	Report Period FROM: __ __/__ __/__ __ THRU: __ __/__ __/__ __

PART I: PROGRAMMED MANHOURS

ATTORNEYS		ADMIN
(+)	PROGRAMMED AVAILABLE MANHOURS	(+)
	VACANT POSITION	
	LEAVE	
	PASS	
	MEDICAL	
	TDY TRAINING	
	TDY TDS	
	OTHER(EXPLAIN)	
(-)	TOTAL	(-)
(+)	EXTRA AVAILABLE HOURS	(+)
(=)	ACTUAL AVAILABLE MANHOURS	(=)

PART II: ACTUAL MANHOURS (FROM REPORT II)

	1. JUDICIAL	
	2. ADMINISTRATIVE	
	3. NONJUDICIAL	
	4. MISCELLANEOUS	
	TOTAL DEFENSE DUTIES	
	5. SJA DUTY	
	TOTAL ACTUAL MANHOURS	
	6. EXTRA MANHOURS	

Date Prepared: __ __/__ __/__ __

Preparer's Signature

USATDS Form 1 (15 May 78)
(For Preparation Instructions See: TG Memo 78-3)

Figure 2

USATDS MANAGEMENT REPORT II

MANAGEMENT CENTER: __ __:__ __ __	INSTALLATION:	DATE PREPARED: __ __/__ __/__ __	REPORT PERIOD: FROM __ __/__ __/__ __ THRU __ __/__ __/__ __

	ACTIVITY	-ACTIONS- LAST TOTAL (+)	NEW ASSND (+)	TOTAL TRIED (-)	OTHER DISPO (-)	NEW TOTAL (=)	-HOURS- PRETRIAL /HEARING (+)	CTROOM /HEARING (+)	POST-TRL /HEARING (+)	TRANS (+)	AWAIT TRANS (+)	ADVICE ONLY (+)	TOTAL HOURS (=)
1. JUDICIAL	ART 32 INV											n/a	
	GEN CT-M											n/a	
	SP CT-M BCD											n/a	
	SP CT-M NON BCD											n/a	
	SUM CT-M											n/a	
2. ADM	REPRESENTATION												
	CONSULTATION	n/a		n/a	n/a	n/a	n/a	n/a	n/a				

		TOTAL ACTIONS	TOTAL HOURS LESS HEARINGS	TOTAL COMMANDER'S HEARINGS	TOTAL HOURS
3. NJ	ARTICLE 15's				
	ADVICE TO SUSP		n/a	n/a	

	OTHER(LIST)	TOTAL HOURS	OTHER(LIST)	TOTAL HOURS
4. MISCL	FIELD EXERCISE		MANAGEMENT	
	TEACHING		PROF CONSULT	
	PHYSICAL TRAINING		OTHER	
	MILITARY TRAINING			
	PROF STUDY			

5. SJA DUTY	ACTIVITY	HOURS
	LEGAL ASSISTANCE	
	CLAIMS	
	LITIGATION	
	MILITARY AFFAIRS	
	INTERNATIONAL LAW	
	PROSECUTOR	
	OTHER	

REMARKS:

USATDS Form 2 (1 JUL 78)

Figure 3

2. ADMIN BOARDS (CONT.)					
A. REPRESENTATION		B. CONSULTATION			
AUTHORITY	NO.	AUTHORITY	NO.	AUTHORITY	NO.
CHAP 14, 635-200		AR 635-200:			
AR 635-100		CHAP 5-31			
		5-32			
		5-33			
		5-34			
		CHAP 9			
		CHAP 10			
		CHAP 13			
		CHAP 14			
		AR 604-10			
		AR 735-11			

OFFICER MCC	HOME MCC	HOURS	6. EXTRA
__ __ : __ __ __	__ __ : __ __ __		
__ __ : __ __ __	__ __ : __ __ __		
__ __ : __ __ __	__ __ : __ __ __		
__ __ : __ __ __	__ __ : __ __ __		

DATE PREPARED: __ __ / __ __ / __ __ _____

PREPARER'S SIGNATURE

Divorce In The Fifty States: An Overview As Of August 1, 1978

By Doris Jonas Freed and Henry H. Foster, Jr.

Doris Jonas Freed, J.S.D., a New York City practicioner, is a member of the Council of the Family Law Section, A.B.C., and Chairman of its Research Committee; Henry H. Foster, Jr., is Professor Emeritus of New York University School of Law, Professor at New York Law School, and former Chairman of the ABA Family Law Section.

TABLES

TABLE I—GROUNDS FOR DIVORCE

As of August 1, 1978, the three American jurisdictions of Illinois, Pennsylvania and South Dakota still retain the "fault only" grounds for divorce, despite past and continuing efforts of the forces for change and reform. South Dakota rejected no-fault at its 1978 legislative session.

There are now 33 states with the irretrievable breakdown ground. In some seventeen it is the sole ground. In the remaining sixteen it has been added to traditional fault grounds:

A. *Irretrievable Breakdown Sole Ground in:*

1. Arizona
2. California (plus insanity)
3. Colorado
4. Delaware (provable only by fault grounds or voluntary separation, separation for 1 year under decree of separate maintenance, proof of marital discord, or commitment for mental illness)
5. Florida
6. Iowa
7. Kentucky
8. Michigan
9. Minnesota (provable only by fault grounds, 1 year's separation, separation for 1 year under decree of separate maintenance, proof of marital discord, or commitment for mental illness)
10. Missouri (if contested, provable only by fault grounds, 2 years living apart, or living apart by mutual consent for 1 year)
11. Montana
12. Nebraska
13. Oregon
14. Virgin Islands
15. Washington
16. Wisconsin (where both parties agree; if one party fails to agree, living apart for one year necessary, and court thereafter may delay granting of divorce decree and order counseling to attempt reconciliation) (conversion of legal separation into absolute divorce upon petition of both parties or of one party after a year)
17. Wyoming (irreconcilable differences in the marital relationship) (plus insanity)

B. *Breadown Added to Traditional Grounds:*

1. Alaska (irretrievable breakdown caused by incompatibility)
2. Alabama
3. Connecticut
4. Georgia
5. Hawaii
6. Idaho (irreconcilable differences deter-

mined by court to be substantial reasons for not continuing marriage)

7. Indiana

8. Maine (irreconcilable difference causing marriage to break down)

9. Massachusetts (irretrievable breakdown plus notarized separation agreement and expiration of six months after court's approval of agreement, hearing no earlier than 12 months after complaint filed)

10. Mississippi (irreconcilable differences upon joint bill by both spouses, or personal jurisdiction over both and no contest or denial)

11. New Hampshire (irreconcilable differences caused by irretrievable breakdown of marriage)

12. North Dakota (irreconciable differences found by court to be substantial reasons for not continuing marriage)

13. Texas (insupportability)

14. Tennessee (irreconcilable differences if defendant personally served and no contest or denial; if parties have executed notarized property settlement referring specifically to pending action, personal service on defendant unnecessary)

15. Rhode Island (irreconcilable differences which have caused the irremedial breakdown of the marriage)

16. Ohio (joint bill-parties must execute separation agreement and reaffirm agreement in court)

C. Incompatibility States:

1. Alabama
2. Alaska
3. Connecticut (plus living apart 18 months)
4. Kansas
5. Nevada
6. New Mexico
7. Oklahoma

D. *Living Separate and Apart.* These periods may have been changed after this study went to press:

1. Arkansas (3 years)
2. Connecticut (18 months due to incompatibility)
3. District of Columbia (6 months voluntary; 1 year involuntary)
4. Hawaii (2 years)
5. Idaho (5 years)
6. Louisiana (2 years; Louisiana now grants a separation from bed and board where spouses have lived apart for 6 months and both spouses execute an affidavit that they have so lived apart and that there exist irreconciable differences which render their living together insupportable and impossible; this may be converted into an absolute divorce one year thereafter).
7. Maryland (voluntary 1 year; involluntary 3 years)
8. Minnesota (living separate and apart for 180 days. eff. 1 March 1979)
9. Nevada (1 year, in court's discretion)
10. New Jersey (18 months)
11. North Carolina (1 year)
12. Ohio (living apart 2 years and also on petition of both spouses and execution of separation agreement confirmed by appearance in court by both).
13. Puerto Rico (2 years)
14. Rhode Island (3 years)
15. South Carolina (3 years)
16. Texas (3 years)
17. Vermont (6 months)
18. Virginia (1 year)
19. West Virginia (2 years)

E. *Conversion from Judicial Separation or Separate Maintenance:*

1. Alabama (2 years after decree of judicial separation or separate maintenance)
2. Connecticut (at any time after separation decree)
3. Hawaii (2 years living apart pursuant to decree of bed and board or separate maintenance)
4. Louisiana (1 year from date of signing of separation from bed and board)
5. New York (1 year living apart pursuant to decree of judicial separation or separation agreement)
6. North Dakota (decree of separation in effect over 4 years and reconciliation improbable)
7. Tennessee (2 years after separation from bed and board)
8. Utah (3 years living apart under decress of separate maintenance of any state)
9. Wisconsin (1 year living apart pursuant to decree of legal separation)

F. *Mutual Consent Divorces:*

1. Mississippi (irreconcilable differences upon joint bill or where defendant personally served and no contest or denial)
2. Ohio (petition by both spouses, and execution of separation agreement and confirmation of agreement in court by both spouses)
3. Tennessee (irreconcilable differences if defendant personally served and no contest or denial or if parties have executed notarized property settlement referring specifically to the pending action, personal service unnecessary)
4. New York (in a sense New York belongs in this category because execution of a separation agreement or obtaining legal separation is an implied cent to divorce by either a year later)

TABLE II—ELIMINATION OF TRADITIONAL DEFENSES

Eroding of defenses against divorce:

A. Practically every state has abolished some defenses. Examples: Alabama, Connecticut, Florida, Hawaii, Illinois, Iowa, Massachusetts, New Hampshire, Oklahoma, Rhode Island, South Dakota.

B. Some states have abolished certain defenses only to certain grounds. Examples: Alabama, Alaska, Arkansas, Louisiana, Mississippi, New Mexico, Puerto Rico, Tennessee, Texas, Vermont, Virginia.

C. Some states have abolished all defenses. Examples:

1. Arizona
2. California (misconduct bears on child custody)
3. Colorado
4. Delaware
5. District of Columbia (none by statute)
6. Indiana
7. Kentucky
8. Minnesota (none, except by case law)
9. Missouri
10. Montana
11. New York (except where ground is adultery)
12. Ohio (defenses only by case law, recrimination, reconciliation and *res judicata*)
13. Oregon
14. Utah (none except by case law)
15. Virgin Islands
16. Wisconsin

TABLE III—TRENDS

A. Recognition of contribution, nonmonetary as well as monetary, of spouse: (a) as a homemaker; (b) as a parent; (c) to career of other; (d) to well-being of the family—shall be given recognition as contribution to assets of marriage:

1. Colorado
2. Delaware
3. District of Columbia
4. Florida
5. Illinois
6. Indiana
7. Kentucky
8. Maine
9. Maryland
10. Massachusetts
11. Michigan
12. Minnesota (eff. 3/1/79)
13. Mississippi
14. Missouri
15. Montana
16. Nebraska
17. New Hampshire
18. Ohio
19. Oregon
20. Rhode Island
21. Virginia
22. Wisconsin

B. Property distribution statutes often enumerate sepecific criteria as guides to courts. Examples of criteria: (1) duration of marriage; antenuptial agreement of parties; (2) age, health, station in life; (3) occupation; (4) amount and sources of income; (5) vocational skills; (6) employability; (7) estate, liabilities and needs of each party and opportunity of each for further acquisition of capital assets and income; (8) contribution or dissipation of each party in acquisition, preservation, appreciation or depreciation of marital property, including services as a homemaker. Among states listing specified criteria are:

1. Arizona

2. California
3. Colorado
4. Connecticut
5. Delaware
6. District of Columbia
7. Illinois
8. Indiana
9. Kentucky
10. Maryland
11. Massachusetts
12. Michigan
13. Minnesota
14. Missouri
15. Montana
16. Nebraska
17. Ohio
18. Rhode Island
19. South Carolina (court decision)
20. Vermont
21. Washington
22. Wisconsin

C. Marital Misconduct: Trend to minimize its importance:

1. States expressly or impliedly excluding a marital fault from consideration in awarding alimony or distributing property:

a. Alaska
b. Arizona
c. California
d. Colorado
e. Delaware
f. Hawaii (by case law)
g. Illinois
h. Kentucky (relevant on amount of alimony)
i. Minnesota
j. Montana
k. Ohio
l. Oregon
m. South Dakota
n. Washington
o. Wisconsin (martial misconduct relevant in award of alimony)
p. Virgin Islands

2. States which regard marital fault as a discretionary factor which may be conered:

a. Alabama
b. Arkansas
c. Connecticut
d. Florida (where adultery)
e. Massachusetts (conduct of parties is held relevant in property distribution and alimony)
f. Michigan (conduct of the parties is held relevant as in Massachusetts)
g. Nebraska
h. Nevada
i. New Jersey
j. Rhode Island
k. South Dakota
l. Wyoming

3. States making marital misconduct an automatic bar to alimony:

a. Georgia (adultery and desertion)
b. Louisiana
c. New York (for any fault ground)
d. North Carolina (where adultery)
e. Puerto Rico
f. Rhode Island
g. South Carolina (where adultery)
h. Tennessee
i. Virginia (for any fault ground)
j. West Virginia (where adultery)

4. Following states make no mention of marital fault in alimony and marital property statutes:

a. Indiana
b. Iowa
c. Kansas
d. Maine
e. Maryland
f. Minnesota
g. Nebraska
h. Nevada
i. New Hampshire
j. New Mexico
k. North Dakota
l. Oklahoma
m. Utah
n. Vermont
o. Wyoming

5. Following states make economic misconduct a factor to be considered:

a. Arizona
b. Delaware
c. Hawaii
e. Indiana
f. Illinois

G. Montana, and a growing number of other states

TABLE IV—DISTRIBUTION OF PROPERTY

A. Distribution of Property Upon Divorce in Community Property Jurisdictions of:

1. Puerto Rico
2. Arizona
3. California
4. New Mexico
5. Nevada
6. Idaho
7. Louisiana
8. Texas
9. Washington

Traditionally, fault has been important as to amount of distribution or as a bar to distribution. Except in California, Arizona and Washington and in some cases in Louisiana, martial misconduct may decrease or eliminate guilty party's share of community property distribution. In California, Louisiana and Washington, there normally is an equal division of the community. In the other community property states there is an equitable distribution.

B. Distribution of Property in Common Law Property Jurisdictions:

1. Common law property states where courts have no general or equitable power to distribute property and title alone controls—subject to constructive trusts and tracing of equitable title:

a. Florida
b. Mississippi
c. Pennsylvania
d. Tennessee (may equitably distribute jointly held property)
e. Virginia
f. West Virginia
g. New York

2. There are now about thirty-seven common law property states where the courts have equitable jurisdiction to distribute property. These state are:

a. Alabama (as to alimony only)
b. Alaska
c. Arkansas
d. Colorado
e. Connecticut
f. Delaware
g. District of Columbia
h. Georgia (as to alimony only)
i. Hawaii
j. Illinois
k. Indiana
l. Iowa
m. Kansas
n. Kentucky
o. Maine
p. Maryland (under new law court may not distribute property but may make award of money in lieu thereof, eff. Jan. 1, 1979)
q. Massachusetts
r. Michigan
s. Minnesota
t. Missouri
u. Montana
v. Nebraska
w. New Hampshire
x. New Jersey
y. North Carolina (as to alimony only)
z. North Dakota
aa. Ohio (as to alimony only)
bb. Okahoma
cc. Oregon
dd. Rhode Island
ee. South Carolina (by court decision see Wilson v. Wilson, 4 FLR 2265 S.D. 1978)
ff. South Dakota
gg. Tennessee
hh. Utah
ii. Vermont
jj. Wisconsin
kk. Wyoming

Note: Some states permit only property accumulated during the marriage to be distributed, whereas other states permit premarital separate property as well to be distributed. The state of the law puts a premium on the drafting of antenuptial and separation agreements.

3. *Criteria for Distribution:*

A. Elaborate and specific standards for equitable distribution are set forth in the law of an increasing number of states.

B. Other states distribute property according to general standards of equity and justice (laws contain no specified statutory criteria).

4. *Among criteria we find generally:*

A. Contributions of each spouse to marriage, marital assets, and financial condition of spouse seeking alimony and spouse from whom maintenance is sought.

B. Duration of marriage, age, health (emotional and physical), circumstances of the parties, amount and sources of income, preseparation standard of living, contribution of each in the acquisition preservation, or appreciation of the marital property.

C. Present and prospective earnings of each party, vocational skills,. needs of custodial parent, desirability of custodial parent working or remaining in home to care for children.

TABLE V—ALIMONY (MAINTEANCE)

1. Concept changed as to alimony in many states. It is called maintenance.

2. Increasingly no-fault oriented.

3. Trends—to downgrade marital fault by:

a. Specifically excluding it (as in Alaska, Arizona, Colorado, Delaware, Illinois, Montana, Oregon, Virgin Islands, Washington), or

b. Eliminating it from the specific criteria by not mentioning it.

4. Emphasis on actual need and ability to pay.

5. Award for a limited time to allow recipient to become self-supporting (rehabilitative maintenance).

6. In about thirty-nine states, the court may award maintenance to either spouse; in some states courts empowered to make "lump sum" alimony awards. In an increasing number of states, specific statutory criteria for maintenance awards are enumerated.

7. In a number of states, statutory provisions giving court authority to require security for maintenance payments.

Alimony (Maintenance) to Either Party:

a. Alaska
b. Arizona
c. California
d. Colorado
e. Connecticut
f. Delaware ("dependent" spouse)
g. District of Columbia
h. Florida
i. Hawaii
j. Illinois
k. Indiana ("physically or mentally handicapped")
l. Iowa
m. Kansas
n. Kentucky
o. Louisiana (by court decision—see LeBlanc v. Loyacana, 4 FLR 2267 (La. 1978)).
p. Maryland
q. Massachusetts
r. Michigan
s. Minnesota
t. Missouri
u. Montana
v. Nebraska
w. Nevada (to wife or to husband if disabled or unable to provide for himself)
x. New Hampshire
y. New Jersey
z. New Mexico
aa. North Carolina (to "dependent" spouse)
bb. North Dakota
cc. Ohio
dd. Oklahoma
ee. Oregon
ff. Rhode Island
gg. Utah
hh. Vermont
ii. Virginia
jj. Virgin Islands (to either if in need)
kk. Washington
ll. West Virginia
mm. Wisconsin

8. States which allow maintenance to wives only:

a. Alabama
b. Arkansas
c. Georgia
d. Idaho
e. Maine
f. Mississippi
g. New York
h. South Carolina
i. South Dakota

j. Tennessee
k. Wyoming

9. States which do not award alimony upon absolute divorce:
a. Pennsylvania
b. Texas

TABLE VI—DURATIONAL RESIDENCY REQUIREMENTS

Current Trends:
1. Cutting down periods of time.
2. G.I. Statutes—Increasing in number, now in effect in many states.
3. In some states no durational residency required—just bona fide residence or domicile, *e.g.*, Utah and Washington.
4. Current durational residency requirements, examples:
Arizona—90 days
Colorado—90 days
Delaware—3 months
District of Columbia—lowered to 180 days (from 1 year).
Hawaii—lowered to 180 days (from 1 year)
Illinois—lowered to 90 days
Kansas—60 days
Kentucky—180 days
Michigan—180 days
Minnesota—180 days (eff. 3/1/79)
Missouri—90 days
Montana—90 days
Utah—residence in state
Washington—residence in state—court does not act for 90 days after petition filed.
Wyoming—60 days by plaintiff unless marriage in state and petitioner resident at time of filing petition in which case no durational residency requirement.

TABLE VII—CHANGES IN CHILD SUPPORT

Since 1970, in about thirty-two states, statutes specify child support as the obligation of both parents, rather than as formerly, the primary obligation of the father. In some states, this result has been achieved by court decision, rather than legislation.

In some states specific criteria are listed by their statutes as an aid to the court in its determination. These are:
1. the financial resources of the child;
2. the financial resources of the custodial parent;
3. the standard of living the child would have enjoyed had the marriage not been dissolved;
4. the physical and emotional condition of the child, and his educational needs; and
5. the financial resources and needs of the noncustodial parent.

TABLE VIII—CHILD CUSTODY

A. In the area of child custody, probably one of the most important recent developments is observable in the recent increase in the number of states which have adopted the Uniform Child Custody Jurisdiction Act.

The Uniform Child Custody Jurisdiction Act, whose basic purposes are to discourage continued controversies over child custody in the interest of stability of home environment for the child, to deter child abductions and like practices, and to promote interstate assistance in adjudicating custody matters, is being adopted by an increasing number of states. Whereas three years ago, the number of states was only nine, today about twenty-eight states have enacted the Act into law. Among these are:
1. Alaska
2. Arizona
3. California
4. Colorado
5. Connecticut
6. Delaware
7. Florida
8. Georgia
9. Hawaii
10. Idaho
11. Indiana
12. Iowa
13. Kansas
14. Louisiana
15. Maryland
16. Michigan
17. Minnesota
18. Missouri

19. Montana
20. New York
21. North Dakota
22. Ohio
23. Pennsylvania
24. South Dakota
25. Oregon
26. Rhode Island
27. Wisconsin
28. Wyoming

A number of states which have adopted only portions of the U.C.C.J.A. are not included in the above list.

B. Articulated standards for custody appear in the majority of new statutes, such as:

1. Age and sex of child;
2. Wishes of child as to his custodian;
3. Interreaction and interrelationship of child with parent or parents, his siblings and any other person who may significantly affect the child's best interests;
4. Child's adjustment to home, school and community;
5. The mental and physical health of all parties involved.

Such guidelines are to be found in the laws of Arizona, Delaware, the District of Columbia, Florida, Illinois, Indiana, Kentucky, Louisiana, Michigan, Minnesota, Missouri, Montana, Nebraska, Ohio and Vermont and a number of other states. The guidelines are either taken from the Uniform Marriage and Divorce Act intact or are more or less elaborate revisions thereof.

C. Many new statutes provide for appointment of guardians ad litem or an attorney to represent child in marital dissolution where custody is at issue, and there are provisions in a number of state laws for investigations and reports to the courts as well as for interviews of the child by the court in chambers. (Wisconsin provides that in all matrimonial actions where child custody is contested, the court *shall* appoint a guardian ad litem to represent child's interests as to custody, support and visitation).

Query: Should not all settlement agreements (even where uncontested) be scrutinized as to adequate protection for child?

D. Tender Years Doctrine.

In custody awards, the "tender years" doctrine has lost ground and is rejected or relegated to role of "tie-breaker" in most states. To some small degree, an increase is observable in awards to joint custody (for the most part where parents have so provided by agreement), and of custody awards to a father. (In Oregon and Wisconsin statutes specify court may make award of joint custody under certain circumstances).

Rejected by statute or court decision in:

1. Alaska
2. Arizona
3. California
4. Colorado
5. Connecticut
6. Delaware
7. District of Columbia
8. Georgia
9. Hawaii
10. Illinois
11. Indiana
12. Iowa
13. Maine
14. Massachusetts
15. Maryland
16. Michigan
17. Minnesota
18. Nebraska
19. New Hampshire
20. New York (lower court decision)
21. North Carolina
22. Ohio
23. Texas
24. Utah
25. Washington
26. Wyoming

E. The "tender years" doctrine remains in effect but may be subordinated to best interests of the child. Examples:

1. Alabama
2. Arkansas
3. Florida
4. Kentucky
5. Louisiana

6. Mississippi
7. New Jersey
8. Rhode Island
9. South Carolina
10. Tennessee
11. West Virginia
12. Wisconsin

F. The "tender years" doctrine gives preference to a "fit" mother, other factors being equal. Examples:

1. Idaho
2. Minnesota
3. Missouri
4. Montana
5. Nevada
6. New Mexico
7. North Dakota
8. Oklahoma
9. South Dakota
10. Virginia

G. Doubtful states:

1. Kansas
2. Oregon
3. Vermont

H. In those seventeen states having state ERA provisions, the "tender years" doctrine still persists in about five states and has been discarded in about twelve ERA states. Examples:

1. Alaska—doctrine discarded
2. Colorado—doctrine discarded
3. Connecticut—doctrine discarded
4. Hawaii—doctrine discarded
5. Illinois—doctrine discarded
6. Louisiana—still persists
7. Maryland—doctrine discarded
8. Massachusetts—doctrine discarded
9. Montana—still persists
10. New Hampshire—doctrine discarded
11. New Mexico—still persists
12. Texas—doctrine discarded
13. Utah—doctrine discarded
14. Virginia—still persists
15. Washington—doctrine discarded
16. Wyoming—doctrine discarded

I. Some state have enacted laws specifically "de-sexing" child custody. Examples:

1. Delaware
2. District of Columbia
3. Minnesota
4. Nebraska
5. Nevada
6. New Hampshire
7. Oregon
8. Texas
9. Wisconsin
10. Wyoming

J. In a number of other states, there are statutes equalizing parental rights to child custody. Examples:

1. Alaska
2. Arkansas
3. California
4. Colorado
5. Connecticut
6. Florida
7. Georgia
8. Hawaii
9. Idaho
10. Indiana
11. Kansas
12. Louisiana
13. Massachusetts
14. New Jersey
15. New York
16. North Carolina
17. North Dakota
18. Ohio
19. Tennessee
20. Virginia

TABLE IX—VISITATION RIGHTS FOR GRANDPARENTS

A phenomenon of the sixties and the seventies has been the enactment of statutes in some states specifically conferring upon a child's grandparents standing to seek in court visitation rights with their grandchildren under certain circumstances such as the death of the child's parent or parents, their divorce or their separation.

These statutes were enacted as a reaction to the common law doctrine generally followed by the states, holding that grandparents had no legal right to visitation with grandchildren if

the custodial parent or parents objected. Frequently grandparents were denied visitation by a custodial parent or stepparent. The existence of animosity or hostility between custodial parents and a child's grandparents and instances of animosity where a child has been adopted by a step-parent have usually been the causes for denial of access of grandparents to the child.

For a full discussion of the matter see Foster and Freed, "Grandparents' Visitation: Vagaries and Vicissitudes" (N.Y.L.J., June 24, 27 and 28, 1978).

Statutes Permitting Visitation Rights for Grandparents:

1. Arkansas
2. California
3. Connecticut
4. Florida
5. Georgia
6. Hawaii
7. Idaho
8. Iowa
9. Louisiana
10. Michigan
11. Minnesota
12. Missouri
13. New Jersey
14. New York
15. Ohio
16. Oklahoma
17. Texas
18. Wisconsin

TABLE X—BETTER ENFORCEMENT TECHNIQUES

A. Long-Arm Statutes specifically applicable to alimony and/or support (for wife and children). Examples:

1. California
2. Connecticut
3. Florida
4. Idaho
5. Indiana
6. Illinois
7. Kansas
8. Massachusetts
9. Michigan
10. Missouri
11. Nevada
12. New Mexico
13. New York
14. Ohio
15. Oklahoma
16. Tennessee
17. Texas
18. Utah
19. Wisconsin

For an interesting case setting constitutional limits, see *Kulko v. Horn*, 564 P.2d 353 (Calif. 1977), rev'd 4 FLR 3075, 98 S. Ct. 607, 54 L. Ed. 2d 476 (1978).

B. Uniform Support of Dependents Act (N.Y.); Uniform Reciprocal Support Act in Other States [New York Act must be changed to include exwives as dependents. Twenty-nine other states include ex-wives].

C. Federal IV-D Program

Garnishment of wages of all federal employees, including those in armed services, but new limitations as to amount of garnishment; Federal and State Parent Loocator Services; File search of federal records; Enforcement in federal court by Internal Revenue Service if all else fails.

(Many millions of dollars in arrearages already have been collected since this act in effect).

D. An increasing number of states require payment of maintenance and child support directly to an official of the court who keeps record of arrears, sends for delinquent spouse, and often court requires security for future payments.

E. A number of states now provide for wage deduction orders after one or more defaults and forbid employers to discharge employees because of wage deductions for alimony or child support.

TABLE XI-CONVERSION OF INSURANCE UPON DIVORCE

In a few states, statutes now provide that accident and health insurance policies which terminate on divorce must contain conversion

privilege by divorced spouse without proof of insurability. This may indicate the beginning of a trend. Examples:

Illinois—requires a provision in future insurance policies for right of conversion of policy upon divorce by a former spouse. Former spouse may convert policy into an individual insurance policy within 60 days after divorce without proof of insurability. Future policies may not terminate coverage upon decree of separate maintenance.

Wisconsin—accident and health insurance policies shall provide that a divorced spouse has right to convert to individual policy within 60 days after divorce.

South Carolina—reported to have a similar law.

TABLE XII-SPOUSAL RIGHTS IN RETIREMENT AND PENSION BENEFITS

A number of community property states and an increasing number of common law equitable jurisdiction property states (which by statue and court decision authorize divorce courts to distribute marital property) have recognized spousal claims to an interest in retirement and pension benefits upon divorce.

A. Community property states recognizing vested retirement or pension benefits as part of the community:

1. California [In re Marriage of Brown 544 P 2d 56 (Cal. 1976), recognizing as community property an unmatured interest in a retirement pension].
2. Idaho
3. Louisiana
4. New Mexico
5. Texas [Cearley v. Cearley, 544 S.W. 2d 661 (Tex. 1976); same result as in In re Marriage of Brown, *supra*].
6. Washington

B. Common law (equitable jurisdiction) property states which have ruled on whether such spousal claims are contributable upon divorce:

1. Colorado
2. Florida
3. Michigan [Hutchins v. Hutchins, 248 N.W. 2d 272 (Mich. 1977)].
4. Missouri [Powers v. Powers, 527 S.W. 2d 949 (Mo. 1975)].
5. Nebraska (to be considered in fixing alimony).
6. New Jersey (most progressive).
7. Wisconsin [Pinkowski v. Pinkowski, 266 N.W. 2d (Wis. 1975), Leighton v. Leighton, 261 N.W. 2d 457 (Wis. 1978); Wis. Stat. Ann. §247-255]. For a discussion of the subject see Foster and Freed, "Spousal Rights in Retirement and Pension Benefits." 16 Journal of Family Law 187 (1977–78)

Administrative and Civil Law Section

Administrative and Civil Law Division, TJAGSA

The Judge Advocate General's Opinions

(Military Installations, Law Enforcement) **Installation Commanders Can Restrict Solicitation Of Funds By The International Society For Krishna Consciousness.** DAJA–AL: 1978/2826, 11 August 1978. An Army staff agency requested an opinion on whether the International Society for Krishna Consciousness (ISKCON) may be permitted to solicit funds on military installations. The activities, including fund raising, that ISKCON wishes to conduct on military installations collectively form the religious ritual called Sankirtan. Reasoning that the Army must pursue a middle ground between the "establishment of religion" and the "free exercise" clauses of the first amendment to the U.S. Constitution, The Judge Advocate General indicated that the establishment of religion clause of the first amendment prohibits use of military installations to further the religious goals of outside groups, execept in serving the needs of the military community. If there are members of ISKCON in the military

community, ISKCON should be given the same consideration in accordance with paras 2–2*d*(1) and 4–4, AR 165-20, as any other religious group represented in the command.

Citing the same need for a balanced response to the first amendment requirements, the opinion indicated that religious groups which are authorized to conduct religious services on military installations are permitted to conduct them only in appropriate places, such as chapels, not on public streets or in front of post exchanges or commissaries. Similarly, entry onto Army installations for the purpose of religious proselytizing can be prohibited on the constitituional grounds cited above and, additionally, on the principle enunciated in *Greer v. Spock,* 424 U.S. 828 (1976), that a military installation is dedicated to a specific public purpose and is not a public forum for the exercise of first amendment activities. The conduct of ISKCON activities independent of any religious ritual is subject to the rules applicable to the type of activity concerned. In this regard, solicitation by religious organizations, or their affiliates, for health, welfare, emergency relief and similar charitable purposes is governed by Appendix A, AR 600-29. Para. 4, AR 600-29 (15 October 1978) has been promulgated since the above opinion of The Judge Advocate General and clarifies DA policy concerning solicitation by religious organizations.

(Prohibited Activities And Standards Of Conduct—General) **Official Envelopes And Stationery Cannot Be Used To Solicit Membership In A Private Organization.** DAJA-AL 1978/3346, 8 August 1978. ODCSPER requested The Judge Advocate General render an opinion on the legality of soliciting membership in a private organization (Type 3, AR 210–1) using official envelopes and stationery.

The Judge Advocate General initiailly pointed out that a private organization. (Type 3, AR 210–1) using official envelopes and stationery.

The Judge Advocate General initially pointed out that a private organization is operated by individuals acting outside the scope of any official capacity as Federal officials and under the provisions of paragraph 1–7*c*(13), AR 340–3, and 39 U.S.C. § 3302 and 3204, would not be authorized to use official indicia items for soliciting membership.

Paragraph 2–4, AR 600–50, and paragraph x, DOD Dir. 5500.7, prohibit the use of Government facilities, property, and manpower (including stationery and typing assistance) for other than official purposes. The use of Government stationery, secretarial services, and equipment (typewriters) to solicit membership in a private association would violate those provisions. TJAG also notes that paragraph 5–20. 1*b*, AR 600–20, which permits reasonable efforts to inform individuals of the benefits and worthiness of private associations, is limited by paragraph 5–20.1*a*(2), AR 600–20 which prohibits any activity which implies an attempt to "influence" participation in an association. Thus a letter signed by an installation commander, in his official capacity and addressed to specific individuals, soliciting membership in a private organization could give the appearance that the commander is using his official position to influence membership in the private organization in violation of paragraph 5–20.1*a*(2), AR 600–20.

(Enlisted Personnel—Enlisted Reserve) **Whether An Enlisted Reservist Was Properly Ordered To Active Duty For Unsatisfactory Participation Depends Upon Whether The Notices Of Unsatisfactory Participation, Right to Appeal, And The Activating Orders Were Sent To The Proper Address.** DAJA-AL 1978/3394, 11 September 1978. An enlisted reservist who was reported absent without authority from numerous reserve meetings was ordered to active duty and failed to report. He was apprehended as a deserter, and an investigation under the provisions of AR 15–6 was conducted to resolve whether the reservist was properly activated. This depended on whether the reservist had constructive notice of the notices required by AR 135–91 and the order to active duty, because they were never actually received by the reservist. The investigating officer found that the notices were not properly addressed and that the individual had complied with Army requirements to notify his reserve unit of address changes; and, therefore, rec-

ommended that the individual be restored to the grade of E-4 and honorably discharged. MILPERCEN requested an opinion from The Judge Advocate General as to the individual's military status.

The Judge Advocate General determined the key issue to be whether the notices of unexcused absences, notice of the right to appeal involuntary activation, and the orders to active duty were mailed to the correct addresses. Although the investigating officer found that they were not, the record was legally sufficient to support findings that they were mailed to the proper addresses and that the reservist did not properly notify his unit of address changes. The Department of the Army is not bound by the investigator's findings. The solution, then, lies in a factual resolution by ODCSPER. If the investigating officer's finding is upheld, then the reservist was not properly activated and discharge under appropriate Reserve regulations must be accomplished because the individual's statutory service obligation is completed. If ODCSPER decides that the documents were mailed to the correct addresses, then constructive notice was given, the activation was properly accomplished, and the individual may be ordered to active duty to complete his term of service or discharged for the convenience of the Government under the provisions of paragraph 5-3, AR 635-200.

(Line of Duty) **An Installation Commander May Not Rescind His/Her Previous Approval of Findings.** DAJA-AL 1978/3464, 22 September 1978. An installation commander approved findings that a National Guard member was injured in line of duty before release from active duty for training (ADT). Thereafter, the State National Guard submitted a request for payment of emergency medical care. A statement from the National Guard member revealed that he had arrived at home prior to the time of the accident, notwithstanding the fact that the National Guard member's orders and DD Form 214 reflected that the effective date of his release from ADT was the day of the accident. The installation commander reversed his position and rescinded his earlier findings. The Judge Advocate General expressed the opinion that the approved findings included a finding that the National Guard member was on ADT when injured. However, The Judge Advocate General has consistently expressed the opinion that while a member is entitled to compensation for an injury incurred while travelling directly to or from ADT, he is not entitled to benefits for injury incurred before that travel commences or after it terminates.

Though the National Guard member was not in the line of duty, the installation commander is without authority to rescind his approved findings. Para. 3-11, AR 600-33, provided that the Secretary of the Army or The Adjutant General acting for him, may at any time change a line of duty finding to reflect the correct conclusion based on the facts. The authority to correct a line of duty determination has not been delegated below The Adjutant General, and the purported revocation of the informal line of duty determination by the installation commander was without legal effect.

(Boards and Investigations) **A Flying Evaluation Board Is Administrative Rather Than Disciplinary, And The Rules Of Evidence For Courts-Martial Do Not Apply.** DAJA-AL 1978/3664, 29 September 1978. A Flying Evaluation Board (FEB) recommended that the respondent be suspended from flying status indefinitely and permanently removed from the Army aviation program based on a finding that the aviator was "professionally unqualified for further utilization as an Army aviator" because of several incidents of marihuana use by the aviator, some of which occurred while he was piloting an Army aircraft. The aviator appealed his suspension and removal from the flight program to the Commander, MILPERCEN, who sought a legal opinion from The Judge Advocate General. The appeal charged that the proceedings were disciplinary and, therefore, should have been conducted under the UCMJ, rather than as a FEB; that his statement to his unit commander admitting marihuana use was inadmissible before the board because no Article 31 warnings were given at the time the admission was made; that he was denied the right to confront witnesses against him because they invoked Article 31 on cross-examiation; and

that the evidence did not support the board's finding.

In responding to these contentions, The Judge Advocate General determined that the evidence supports a conclusion that the commander who initiated the action was interested in removing the respondent from his flight position regardless of any disciplinary effect. Therefore, the action was proper even if the evidence would not have supported a court-martial conviction. Additionally, the use of an unwarned statement does not necessarily invalidate the proceedings. paragraph 3-7*c* (6), AR 15-6 only prohibits the use of involuntary admissions, "obtained by unlawful coercion or inducement likely to affect its truthfulness." The absence of an Article 31 rights warning is a factor for consideration but does not, of itself, force exclusion. Here, TJAG found substantial evidence to support the ruling of the board president that no undue influence or coercion was used. The Government's case was bolstered by the testimony of two enlisted witnesses that they saw the respondent smoking marihuana while piloting an aircraft. However, both witnesses invoked Article 31 protections when questioned on the details of the incidents such as whether the witness held the marijuana cigarette and why he had not reported it immediately. TJAG found no denial of the opportunity for meaningful and substantial cross-examination of the two witnesses. Finally, on the issue of whether the findings were supported by the evidence, TJAG agreed with the board that four incidents of marihuana use were enough to find that the respondent had "an undesirable habit or trait of character" within the meaning of the applicable regulation (AR 600-107) and that this finding was not affected by the local Alcohol and Drug Abuse Prevention Control Program counselor's determination that the respondent did not have a drug problem. Also, the drug exemption program could not preclude FEB indefinite suspension or removal from the Army aviator program even if the respondent needed drug rehabilitation. Removal from the aviation program was properly accomplished.

Legal Assistance Items

Major F. John Wagner, Jr., Developments, Doctrine and Literature Department, Major Joseph C. Fowler, and Major Steven F. Lancaster, Administrative and Civil Law Division, TJAGSA.

ITEMS OF INTEREST

Administration—Preventive Law Program; Commercial Affairs—Commercial Practices and Controls—Federal Statutory and Regulatory Consumer Protections. *Federal Trade Commission Issues a Trade Regulation Rule Governing Properietary Vocational and Home Study Schools.* The Federal Trade Commission issued a final rule which requires proprietary vocational and home study schools to provide pro rata refunds to students who withdraw from their courses; to provide information to prospective students concerning the school's graduation and placement records; and to extend the "cooling off" period on vocational school enrollment contracts to 14 days. The purpose of this rule is to alleviate currently abusive practices against vocational and home study students and prospective students. The rule becomes effective on 1 January 1980. For further information contact Walter C. Gross III, Federal Trade Commission, PM-H-221 Sixth Street and Pennsylvania Avenue NW, Washington, DC 20580. Telephone (202) 523-3814. 43 Fed. Reg. 60796, December 27, 1978. [Ref: Ch. 2, DA Pam 27-12].

Commercial Affairs—Commercial Practices and Controls—Federal Statutory and Regulatory Protection—Magnuson Moss Warranty Act. *Modification of Implied Warranties Prohibited In Service Contracts.* A Dallas, TX, law firm requested on behalf of their clients,

automobile dealers who enter into service contracts with vehicle purchasers at the time of the sale, an opinion as to whether § 108 of the Magnuson Moss Warranty Act would prohibit limiting the duration of implied warranties to the duration of the service contract. The Federal Trade Commission issued an advisory opinion which held that § 108(a) of the act flatly prohibited any modification of implied warranties by a supplier when a full warranty is offered or a service contract is entered into.

§108(b) of the Act creates an exception to the general rule in §108 (a) by allowing implied warranties to be limited in duration to the duration of a *warranty* of reasonable duration, if such limitation is conscionable and is set forth in clear and unmistakable language and prominently displayed on the face of the *warranty* (emphasis supplied). This exception does not refer to service contracts or provide for the limitation of implied warranties in service contracts. The Commission felt that, had Congress intended the exception to apply to service contracts as well as warranties, § 108 (b) would read ". . . prominently displayed on the face of the warranty or service contract." [Ref: Ch. 10, DA Pam 27-12.]

Domestic Relations—Alimony and Child Support. *The United States Supreme Court, In Deciding* Kulko v. Superior Court, *436 U.S. 84, 4 Fam. L. Rep. 3075 (1978), Limited The State's Ability To Assert Personal Jurisdiction Over A Non-Resident Party In A Domestic Suit.* The Illinois Supreme Court recently had an opportunity to apply *Kulko* and held that Illinois lacked personal jurisdiction over a nonresident father in an action for alimony and child support arrearages. *Boyer v. Boyer,* 4 Fam. L. Rep. 2110 (Ill., 1978).

The Boyers were divorced in Georgia in 1971 and the husband continued to reside in Georgia. Shortly after the divorce, Mrs. Boyer and her two children moved to Illinois where, three years later, she initiated an action for arrearages. An Illinois appellate court held that the husband's failure to abide by a Georgia divorce decree mandating alimony and child support was a tortious act committed in Illinois, the wife's present residence, and supported jurisdiction under the state's long arm statute. The Illinois Supreme Court held that the husband never voluntarily submitted to Illinois' jurisdiction, and his contacts with Illinois were to tenuous to force him to defend the action in Illinois. To hold otherwise, the court said, would allow the wife too much opportunity to forum shop. The solution to this problem, in the court's opinion, was the use of a URESA proceeding. [Ref: Ch 20, DA Pam 27-12.]

Domestic Relations—Custody. *The District Of Columbia Has Abandoned The "Tender Years" Presumption In Child Custody Cases. Bazermore v. Davis,* 5 Fam. L. Rep. 2131 (D.C. Ct. App., 1978). Henceforth, in the District of Columbia, the best interest of the child will be used to determine custody, and neither parent will be presumed to have the primary right to custody.

An unwed father sought custody of his child from its mother. The trial court denied his petition, relying on the proposition that a fit mother can never be deprived of custody. The Court of Appeals reversed and remanded, holding that the jurisdiction's rule is that the best interest of the child provides the sole basis on which to award custody. The court maintains that this has always been the rule but that, over the years, this standard evolved into a preference for the mother. perhaps recognizing fundamental changes in American family life, the opinion holds that the crucial consideration is which parent can provide the child with the best affection, acceptance, approval, protection, care, control and guidance. That ability, says the court, does not necessarily correspond to the gender of the parent. The trial court will now have to make delicate decisions without the crutch of a presumption for the mother. [Ref: Ch 20, DA Pam 27-12.]

Real Property—Leasing Real Property. *The Superior Court Of Pennsylvania Gave Tenants' Rights Another Boost Recently As It Extended The Doctrine Of Implied Warranty Of Habitability,* Fair v. Negley, *390 A 2d 240 (Super. Ct. Pa., 1978).* Even though the lease involved had a clause which attempted to waive any warran-

ties, the court held that public policy prevented waiver of the implied warranty of habitability. In arriving at its conclusion, the court considered the negative effect such waivers would have on public health and safety, the unequal bargaining power of the parties involved, and the unreasonable financial burdens such a waiver would place on people unable to assume them.

In a further extension of the doctrine, the court held that leases are to be treated as ordinary contracts and that standard contract remedies are available. Therefore, in this case, the court decided that Pennsylvania tenants could use the implied warranty to support an action against the landlord for breach of contract and for intentional infliction of emotional distress when the landlord refuses to make the premises fit for human habitation. Of course, before the doctrine is applicable, the landlord must be given notice of the defect and a reasonable opportunity to correct it. [Ref: Ch 34, DA Pam 27-12.]

The Army Law Library Service (ALLS)

COMMENTS ON AVAILABLE LAW LIBRARY MATERIALS

Rumors abound that within the not-too-distant future the Federal Rules of Evidence will become the sole rules of evidence applicable in courts-martial. Presently, the Federal Rules must be adhered to in courts-martial where they do not conflict with the Manual. Copies of the Federal Rules, both annotated and unannotated, are presently published within many treatises and other materials on hand in Army Law Libraries. For instance, the Federal Rules may be found in Moore's Federal Practice (Bender), United States Code Annotated (West), United States Code (GPO), U.S. Supreme Court Digest (Lawyers' Cooperative), United States Supreme Court Digest (West), Wright, Federal Practice and Procedure (West), Federal Practice Digest, 2nd (West), Criminal Law Reporter (BNA), United States Law Week (BNA), American Jurisprudence 2nd New Topic Service (Lawyers' Cooperative), United States Code Service (Lawyers' Cooperative), 2 U.S. Code Congressional and Administrative News 1974, 2215 (Public Law No. 93-595) (West), 4 U.S. Code Congressional and Administrative News 1974, 7051 (West). The last citation in the U.S. Code Congressional and Administrative News gives the legislative history of the Federal Rules of Evidence.

Before you order a treatise or any material on the Federal Rules of Evidence, please examine these resources in your library and any other sources which may contain the Federal Rules to see if what you have on hand is sufficient for your research.

JUDICIARY NOTES

U.S. Army Judiciary

DIGESTS—ARTICLE 69, UCMJ, APPLICATIONS

1. Two applications for relief under Article 69, UCMJ, from convictions by special court-martial raised questions as to the scope of the offense of missing movement under Article 87, UCMJ. In each case, The Judge Advocate General granted relief from a finding of guilty of a specification alleging that the accused missed movement, through design, by not moving with a Military Airlift Command flight from a stateside Air Force base in connection with a permanent change of station from an instal-

lation located in the United States to one overseas.

These cases suggest that there may be widespread misapprehension as to the nature of the conduct made punishable by Article 87. That statute subjects to punishment by court-martial "[a]ny person subject to this chapter who through neglect or design misses the movement of a ship, aircraft, or unit with which he is required in the course of duty to move . . . ." The aforementioned misconception appears to be that the Article encompasses every instance in which a servicemember does not travel by ship or aircraft, or at least by military ship or military aircraft, when he has been ordered to do so. The weight of authority is to the effect that Article 87 is not so broad.

The Air Force Court of Military Review analyzed the legislative history of Article 87 in the case of United States v. Gillchrest, 50 C.M.R. 832 (A.F.C.M.R. 1975). The *Gillchrest* court concluded that:

[t]he explicit reason for [Article 87] . . . was the problems encountered during World War II as a result of members of units or crews who failed to show when *their* units or ships moved as such, perhaps to combat or forward areas. The seriousness of the offense results from the disruption of the scheduling and movement of an intergrated, coheseperhap self- ufficient and interdependent group of military men that may well have been trained to perform as a unit. Some of the members of the crew or unit could possess particular skills, *e.g.*, communications, demolition, navigation, or supply, the absence of which would cripple or destroy the integrity and effectiveness of the unit. [Emphasis in the orginal.]

Id., 50 C.M.R. at 834. The court reversed the findings as to missing movement on the grounds that the circumstances of the case did not establish "either an urgency of the movement or the existence of an essential mission assigned the accused sufficient to raise this offense to more than a serious failure to repair." *Id.*, 50 C.M.R. at 835. The accused in this case was charged with missing a "Category Z" flight on his individual transfer from a base in the United States to one in Turkey. Such a flight is a commercial one which usually has several military passengers on individual transfers, along with dependents and possibly civilians on their own business.

However, the United States Court of Military Appeals determined that "an important military operation" embarked upon by ship or aircraft can be the subject of an Article 87 violation even though the accused was not assigned to the crew of the aircraft or ship. United States v. Johnson, 3 U.S.C.M.A. 174, 11 C.M.R. 174 (1953) (The accused, an Air Force private, failed to report for individual transportation to a specific maneuver for which he had been issued special equipment; this conduct was held to be a violation of Article 87.)

In a different context, the Army Court of Military Review came to the same conclusion as reached by the *Gillchrest* court with respect to the legislative history of Article 87 and opined, "Hard and fast rules relating to the duration, distance and mission of the 'movement' are not appropriate but rather those factors plus any other concomitant circumstances must be considered collectively, in order to evaluate the *potential disruption of the unit* caused by a soldier's absence." [Emphasis added.] United States v. Smith, 2 M.J. 566, 568 (A.C.M.R. 1976). Similarly, the *Gillchrest* court expressly declined to hold that "Article 87 is an improper charge in all cases in which commercial carriers are the transporting vehicles, since there are numerous circumstances where such a charge would coincide with the legislative intent." United States v. Gillchrest, *supra*, 50 C.M.R. at 836.

The Navy Court of Military Review has adopted a different interpretation of Article 87. In United States v. Lemley, 2 M.J. 1196 (N.C.M.R. 1976), that court decided a case involving a sailor who was being escorted from a brig in the United States to a station in the Phillipines, and who failed to return to the airplane during a stop-over in Hawaii. Finding that the flight was a "movement" for the purposes of Article 87, the court held that the commercial (civilian) nature of the aircraft did

not prevent a conviction under the Article; the court relied upon the holding in United States v. Johnson, *supra*, and held that "[w]here one is pursuant to orders, under a duty to go to a specific place the failure to make the required movement is an offense cognizable under Article 87 . . . ." *Id.*, 2 M.J. at 1198. The Navy Court of Military Review recently reasserted its position in United States v. St. Ann, 6 M.J. 563 (N.C.M.R. 1978). This position is inconsistent with the legislative history discussed above and with the language of the United States Court of Military Appeals which, as noted above, held only that Article 87 could extend to movement of an individual where "an important military operation" was involved.

With respect to the limited question of travel by aircraft, the rationale employed turns not upon whether the flight is military or commercial but upon whether the accused's presence is of significance to the operation of the flight or had some independent and important military significance. Thus, a servicemember who travels individually on permanent change of station orders of a military transport, a commercial plane leased by the military, or a commercial flight on which transportation has been purchased by the military may or may not, depending upon the circumstances, be moving with an aircraft within the meaning of Article 87.

The government, of course, has the burden of proving the accused's guilt beyond a reasonable doubt. Mere evidence of a routine individual permanent change of station by aircraft will not suffice to carry that burden. Consideration should be given in such cases to framing charges in terms of violations of Article 86, UCMJ, such as failure to repair, without authority, to appointed place of duty or unauthorized absence from appointed place of duty. *Lopez-Castro*, SPCM 1978/4268; *Farmer*, SPCM 1978/4297.

2. Application for relief was made pursuant to Article 69, UCMJ, with respect to proceedings to vacate the suspended portion of a sentence by special court-martial. It was contended that the applicant/probationer had been improperly denied representation by "present and available requested military defense counsel". The Judge Advocate General determined that no error had been committed.

The applicant/probationer had been represented at trial by MAJ H. CPT L was assigned to represent the applicant at the vacation proceedings. The applicant/probationer requested MAJ H as counsel, and some confusion ensued as to who would serve as counsel. The confusion continued thoroughout the three weeks preceding the scheduled hearing.

MAJ H and CPT L both appeared at the hearing. MAJ H requested a continuance on the grounds that he had not had adequate time to prepare for the hearing. The request was denied, and MAJ H withdrew. The proceedings were carried to their completion with CPT L serving as counsel.

It was determined that the attorney-client relationship between an accused and the attorney who represented him at trial did not require that the same attorney ordinarily represent the accused at subsequent proceedings to vacate a suspended portion of the sentence. The rules enunciated in U.S. v. Palenius, 2 M.J. 86 (C.M.A. 1977), and U.S. v. Iverson, 5 M.J. 440 (C.M.A. 1978), were held not to govern such a situation.

On the other hand, MAJ H had been properly requested by the applicant/probationer as counsel. It is noted, in this connection, that there is not an absolute constitutional right to counsel at such proceedings. *See* Morrisey v. Brewer, 408 U.S. 471 (1972); Gagnon v. Scarpelli, 411 U.S. 778 (1973). A probationer in a case such as this does, however, have a qualified right to counsel pursuant to the combined operation of paragraph 2-36, AR 27-10, and paragraph 34*c*, MCM 1969 (Rev. ed). Under the circumstances here, the applicant/probationer was entitled to MAJ H as counsel, and it would have been error to deprive the accused of his services. Such did not occur, however.

The hearing officer properly denied the request for a continuance. Both counsel had had ample

notice of the hearing, the hearing had already been postponed once at CPT L's request, and MAJ H knew twelve days before the hearing that the case file was in the possession of CPT L. Under the circumstances, it was not an abuse of discretion to deny the motion for a continuance. When MAJ H thereafter requested permission to withdraw, it was apparent that he did so in the belief that he was insufficiently prepared for the hearing to be of any assistance to the probationer. Accordingly, the hearing officer properly granted permission for such withdrawal. *Antemann*, SPCM 1978/4285.

3. In *Wallen*, SPCM 1978/4277, The Judge Advocate General granted relief from findings of guilty as to a violation of Article 92, UCMJ, (violation of lawful general regulation (paragraph 4-2 (a) 1(a), AR 600-50), by wrongfully and unlawfully accepting money for being influenced in the performance of an official act) and a violation of Article 132 (wrongfully soliciting another to violate a lawful general regulation (paragraph 4-2(a)1(a), AR 600-50), by offering him money for being influenced in the performance of an official act).

The offenses were found to have occurred, as alleged, at divers times between 1 September 1976 and 30 August 1977 and between 1 March 1977 and 30 June 1977, respectively. The accused was discharged on 6 June 1977 and reenlisted on 7 June 1977. It was determined that the evidence clearly indicated that the first offense occurred in its entirety on or before 6 June 1977. It was also determined that there was no evidence of record, other than an uncorroborated confession, to show that acts sufficient to constitute the second offense occurred on or after 7 June 1977. Accordingly, the extant findings were based solely on acts occurring during an enlistment which had terminated prior to the date of trial. Further, jurisdiction over the offenses were not "saved" by Article 3(a), UCMJ. Accordingly, the findings and sentence were set aside.

4. In *Cordova*, GCM 1978/4273, The Judge Advocate General considered a contention that a general court-martial convened on 20 June 1947 lacked *in personam* jurisdiction over the accused in the grounds that he was then sixteen years of age and his enlistment was therefore void. (The applicant's age was recorded at the time of trial as seventeen.)

Analysis of the enlistment law applicable at the time of enlistment (24 September 1946) established that the enlistment in the *Regular Army* of an individual sixteen years of age was then voidable, but not void. (Limitations on enlistment in the Army of the United States were governed by separate authority.) As the applicant enlisted in the Regular Army and his true age was not disclosed until long after trial, the applicant's age was not a jurisdictional bar to the exercise of court-martial jurisdiction over him. Relief was denied.

CLE NEWS

1. Idaho Passes Mandatory CLE. The Idaho State Bar has imposed a mandatory continuing legal education requirement effective 1 January 1979. No further information is available to *The Army Lawyer* at this time. TJAGSA is preparing a request to obtain accreditation for CLE courses offered at the School. Details will follow.

2. Civilian Sponsored CLE Courses.

For further information on civilian courses, please contact the institution offering the course, as listed below:

AAJE: American Academy of Judicial Education, Suite 539, 1426 H Street NW, Washington, DC 20005. Phone: (202) 783-5151.

ALI-ABA: Donald M. Maclay, Director, Office of Courses of Study, ALI-ABA Committee on Continuing Professional Education, 4025 Chestnut St., Philadelphia, PA 19104. Phone: (215) 387-3000.

FBA (FBA-BNA): Conference Secretary, Federal Bar Association, Suite 420, 1815 H Street NW, Washington, DC 20006. Phone: (202) 638-0252.

GWU: Government Contracts Program, George Washington University, 2000 "H" Street NW, Washington, DC 20052. Phone: (202) 676-6815.

ICM: Institute for Court Management, Suite 210, 1624 Market St., Denver, CO 80202. Phone: (303) 543-3063.

NCDA: National College of District Attorneys, College ofelaw, University of Houston, Houston, TX 77004. Phone: (713) 749-1571.

NJC: National Judicial College, Reno, NV 89557. Phone: (702) 784-6747.

NPI: National Practice Institute, 861 West Butler Square, Minneapolis, MN 55403. Phone: 1-800-328-4444 (In MN call (612) 338-1977).

PLI: Practising Law Institute, 810 Seventh Avenue, New York, NY 10019. Phone: (212) 765-5700.

MARCH

1-3: FBA, Southwestern Regional Conference, Two Seminars: Labor, and Federal Trial Practice, Fairmont Hotel, Dallas, TX.

1-2: PLI, Foreign Patent Practice Under EPC and PCT, Waldorf Astoria Hotel, New York.

1-3: PLI, Introduction to Qualified Pension and Profit-Sharing Plans, Barbizon Hotel, New York. Cost: $225.

2-3: PLI, Prisoner's Rights, Sir Francis Drake Hotel, San Francisco, CA. Cost: $125

3: NPI, UCC Update, Playboy Towers Hotel, Chicago, IL.

4-7: NCDA, Prosecuting Drug Cases, Tampa, FL.

4-9: NJC, Search and Seizure (for judges), University of Nevada, Reno, NV. Cost: $300.

9-11: NCDA, Jury Selection Techniques, Adams Hotel, Phoenix, AZ.

10: NPI, UCC Pfister Hotel, Milwaukee, WI.

11-16: NJC, Evidence (for judges), University of Nevada, Reno, NV. Cost: $300.

12-16: AAJE, Trial and Appellate Judges Writing Programs, Kissimmee, FL. Cost: $475.

12-13: FBA-BNA, Annual Briefing Conference on Government Contracts, Barclay Hotel, Philadelphia, PA.

15-16: ALI-ABA, Estate Planning, St. Louis, MO.

15-16: PLI, Medicine for Lawyers, Beverly Hilton Hotel, Los Angeles, CA. Cost: $185.

16-17: ALI-ABA, Professional Malpractice, Denver, Co.

17: NPI, Evidence, Jack Tar Hotel, San Francisco, CA.

18-20: NCDA, Prosecuting Crimes Against Property, New Orleans, LA.

19-20: PLI, Taxation of Real Estate Transfers and Sales, New York Sheraton, New York. Cost: $285.

19-23: GWU, Government Contract Claims, Washington DC.

21-23: ALI-ABA, Legal Problems of Museum Administration, Ft. Worth, TX.

22-23: PLI, Eleventh Hour Tax Legislation: The Revenue Act of 1978, The Technical Corrections Act, The Energy Tax Act, New Orleans Marriott Hotel, New Orleans, LA. Cost: $185.

22-23: PLI, Introduction to Qualified Pension and Profit-Sharing Plans, Hyatt Regency Hotel, San Francisco, CA. Cost: $225.

23-24: PLI, Defending Crimes of Violence, New York Sheraton

24: NPI, UCC Update, Houston Oaks Hotel, Houston, TX.

26–30: AAJE, Law and Psychiatry, University of Miami Law School, Coral Gables, FL. Cost: $350.

29–31: ALI–ABA, The New Federal Bankruptcy Code, Dallas, TX.

30: FBA, Conference on Copyright Law, Crystal City Marriott, Arlington, VA.

APRIL

1–5: NCDA, Organized Crime, part II, Houston, TX.

2–6: GWU, Cost Reimbursement Contracting, Washington DC Cost: $500

4–6: PLI, Fundamental Concepts of Estate Planning, New York Sheraton Hotel, New York. Cost: $250.

5–7: ALI–ABA, The New Federal Banruptcy Code on Video Tape, will be shown at the following locations: Cleveland, OH; Cranford, NJ; Denver, CO; Indianapolis, IN; Milwaukee, WI; North Haven, CT; Philadelphia, PA; Pittsburgh, PA, Seattle, WA, Tucson, AR. Cost: $175.

6: NPI, Kaplan On Evidence, Sands Hotel, Las Vegas, NV.

7: NPI, Kaplan On Evidence, Brown Palace Hotel, Denver, CO.

20: NPI, UCC Update, Stouffer's Hotel, Louisville, KY.

21: NPI, UCC Update, International Inn, Washington, DC.

22–25: ICM, Management of Criminal Cases, Denver, CO

22–26: NCDA, Trial Techniques, Boston, MA.

22–27: NJC, Alcohol and Drugs (for judges), University of Nevada, Reno, NV. Cost: $300.

23–25: Criminal Law II: Pretrial Procedures, Confession and Identification (for judges), Arizona State Univ., Tempe, AZ. Cost: $200.

26–28: AAJE, Evidence II: Cross-examination, Competency and Privilege (for judges). Cost: $200.

26–27, PLI, Ninth annual Employee Benefits Institute, The Biltmore Hotel, New York City. Cost: $185.

27: NPI, UCC Update, Everglades Hotel, Miami, FL.

28: NPI, UCC Update, Marriott Hotel, Atlanta, GA.

29–4 May: NCDA, Prosecutor's Office Administrator Course, Part III, Houston, TX.

29–4 May: NJC, Evidence (Graduate, for judges), University of Nevada, Reno, NV. Cost: $300.

30–4 May: GWU, Patents and Technical Data, GWU Library, Washington, DC. Cost: $425.

MAY

2–4: PLI, Fundamental Concepts of Estate Planning, Hyatt Union Square Hotel, San Francisco, CA. Cost: $250.

4–5: Construction Contracting in the Middle East: Problems and Solutions, Washington, D.C.

6–24: NJC, General Jurisdiction (for judges), University of Nevada, Reno, NV. Cost: $600.

6–11: NJC, Sentencing Felons (Graduate, for judges), University of Nevada, Reno, NV. Cost: $300.

20–25, NJC, Criminal Evidence (Graduate, for judges), University of Nevada, Reno, NV. Cost: $300.

24–25: FBA, Openness in Government V, The Mayflower Hotel, Washington, D.C.

31–2 June: ALI–ABA, Energy Law, Washington, DC.

3. TJAGSA CLE Courses

March 5–16: 79th Contract Attorneys' (5F–F10).

March 5–8: 45th Senior Officer Legal Orientation (War College) (5F–F1).

March 19-23: 11th Law of War Workshop (5F-F42).

March 26-28: 3d Government Information Practices (5F-F28).

April 2-6: 46th Senior Officer Legal Orientation (5F-F1).

April 9-12: 9th Fiscal Law (5F-F12).

April 9-12: 2d Litigation (5F-F29).

April 17-19: 3d Claims (5F-F-26).

April 23-27: 9th Staff Judge Advocate Orientation (5F-F52).

April 23-May 4: 80th Contract Attorneys' (5F-F10).

May 7-10: 6th Legal Assistance (5F-F23).

May 14-16: 3d Negotiations (5F-F14).

May 21-June 8: 18th Military Judge (5F-F33).

May 30-June 1: Legal Aspects of Terrorism.

June 11-15: 47th Senior Officer Legal Orientation (5F-F1).

June 18-29: JAGSO (CM Trial).

June 21-23: Military Law Institute Seminar.

July 9-13 (Contract Law) and July 16-20 (Int. Law): JAOGC/CGSC (Phase VI Contract Law) Int. Law.

July 9-20: 2d Military Administrative Law (5F-F20).

July 16-August 3: 19th Military Judge (5F-F33).

July 23-August 3: 81st Contract Attorneys' Course (5F-F10).

August 6-October 5: 90th Judge Advocate Officer Basic (5-27-C20).

August 13-17: 48th Senior Officer Legal Orientation (5F-F1).

August 20-May 24, 1980: 28th Judge Advocate Officer Graduate (5-27-C22).

August 27-31: 9th Law Office Management (7A-713A).

September 17-21: 12th Law of War Workshop (5F-F42).

September 28-28: 49th Senior Officer Legal Orientation (5F-F1).

JAGC Personnel Section

PP&TO, OTJAG

1. JAGC OFFICERS SELECTED FOR PROMOTION TO BG, AUS

Alley, Wayne E.
Bednar, Richard J.
Overholt, Hugh R.

2. JAGC OFFICERS SELECTED FOR PROMOTION TO COL, AUS—28 DECEMBER 1978

Adams, Allen D.
Andrews, Thomas T.
Fugh, John L.
Henson, Hugh E.
Lasseter, Earle F.
Loftus, Martin R.
Mooneyham, John A.
Mowry, Richard E.
O'Roark, Dulaney L.
Raby, Kenneth A.
Ryker, George C.
Scheff, Richard P.
Suter, William K.
Thornock, John R.
Tichenor, Carroll J.
Tracy, Curtis L.
Wasinger, Edwin P.
Wold, Pedar C.
Witt, Jerry V.

3. AUS PROMOTIONS

COLONEL	
Smith, Robert B.	2 Dec 78
LIEUTENANT COLONEL	
Dancheck, Leonard H.	11 Dec 78
CAPTAIN	
Vowell, Denise K.	28 Jan 79

4. REASSIGNMENTS

NAME	FROM CAPTAINS	TO
Bieber, Arthur	FT Campbell, KY	USALSA, WASH, DC
Brower, Dennis	FT Riley, KS	USALSA, WASH, DC
Byler, Charles	FT Ord, CA	USALSA, WASH, DC
Cascio, Paul	FT Ord, CA	USALSA, WASH, DC
Cirelli, Joseph	FT Meade, MD	OTJAG, WASH, DC
Fitting, Lawrence	FT Bragg, NC	USALSA, WASH, DC
Heitritter, Wilfred	FT Hood, TX	USALSA, WASH, DC
Hemingway, Charles	FT Sill, OK	USALSA, WASH, DC
Higginbotham, Robert	FT Rucker, AL	USALSA, WASH, DC
King, Michael	FT Polk, LA	USALSA, WASH, DC
Serene, Jan	FT Bragg, NC	USALSA, WASH, DC
Trant, Charles	FT Polk, LA	USALSA, WASH, DC
Twiss, Robert	FT Riley, KS	USALSA, WASH, DC
Young, John	FT Hood, TX	USALSA, WASH, DC
Ziegler, Edward	Korea	FT Carson, CO
	WARRANT OFFICERS	
Koceja, Daniel	USALSA, WASH, DC	FT Bragg, NC
McCormick, Dennis	FT Bragg, NC	USALSA, WASH, DC

By Order of the Secretary of the Army:

BERNARD W. ROGERS
General, United States Army
Chief of Staff

Official:

J. C. PENNINGTON
Brigadier General, United States Army
The Adjutant General

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